Supreme Court, U.S.
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No. 98-_____

In The
# Supreme Court of the United States

October Term, 1998

TRAIL ENTERPRISES, INC., d/b/a WILSON OIL COMPANY

*Petitioner*

versus

THE CITY OF HOUSTON

*Respondent*

## Petition For A Writ Of Certiorari To the Fourteenth Texas State Court of Appeals

## PETITION FOR WRIT OF CERTIORARI

*Howard W. Edmunds
Counsel of Record
9525 Ella Lee Lane, Apt 316
P.O. Box 631362
Houston, Texas 77263-1362
Telephone: (713) 953-9718

*Attorney for Petitioner*

146 pp

## QUESTIONS PRESENTED FOR REVIEW

### QUESTION NO. I

**WHETHER THE LOWER COURT VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY NOT ADJUDICATING PETITIONER'S FIRST CAUSE OF ACTION, THAT ORDINANCE 67-2544 WAS UNCONSTITUTIONAL AND VOID BECAUSE IT VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS, AND UNDER THE CONTRACT CLAUSE, ARTICLE I, § 10, CLAUSE 1, ALL BEING PARTS OF THE UNITED STATES CONSTITUTION?**

### II

**WHETHER AN ORDINANCE THAT IS UNCONSTITUTIONAL AND VOID WHEN ENACTED BECAUSE IT VIOLATED ONE OR MORE OF THE DUE PROCESS, EQUAL PROTECTION OR TAKING CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS, OR VIOLATED ARTICLE I, § 10, CLAUSE 1, ALL BEING PARTS OF THE UNITED STATES CONSTITUTION, CAN BECOME A VALID ORDINANCE BY THE IMPOSITION OF A STATUTE OF LIMITATIONS PERIOD?**

## LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Trail Enterprises, Inc., a Texas corporation, d/b/a Wilson Oil Company, and the City of Houston, a municipality in the State of Texas.

Trail Enterprises, Inc., is a wholly owned subsidiary of Forest Cove Development Company, a Texas corporation.

Briefs were filed *amicus curiae* by the Defenders of Property Rights and by Cary M. Maguire.

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## OPINIONS BELOW

The decision of the Fourteenth Texas State Court of Appeals filed November 20, 1997, in the case of Trail Enterprises, Inc., d/b/a/ Wilson Oil Company v. City of Houston, No. 14-96-00689-CV, is reported at 957 S.W.2d 625 (Tex. App.—Houston [14th Dist.] 1997), and is reproduced as Appendix (App.) A.

The Appellate Judgment of the Fourteenth Texas State Court of Appeals (No. 14-96-00689-CV, filed November 20, 1997, is reproduced as Appendix B.

The judgment of the 80th State District Court, Harris County, Texas, April 1, 1996, in the case of Trail Enterprises, Inc., d/b/a Wilson Oil Company v. City of Houston, No. 95-31573, granting Respondent's Motion for Final Summary Judgment is reproduced as Appendix C.

The judgment of the 80th State District Court, Harris County, Texas, April 3, 1996, No. 95-31573, denying Petitioner's Motion For A Partial Summary Judgment in the case of Trail Enterprises, Inc., d/b/a/ Wilson Oil Company, is reproduced as Appendix D.

The Texas Supreme Court's denial of Petitioner's Petition for Review dated July 3, 1998, in the case of Trail Enterprises, Inc., dba Wilson Oil Company v. City of Houston, No. 98-0001, 41 Tex. Sup. Ct. Journal, 1027, is reproduced as Appendix E.

The Texas Supreme Court's overruled Petitioner's Motion for a Rehearing, dated, September 3, 1998, in the case of Trail Enterprises, Inc., d/b/a Wilson Oil Company v. City of Houston, Number 98-0001, 41 Tex. Sup. Ct. Journal 1370, is reproduced as Appendix F.

The opinion and judgment of the Federal District Court, Southern District of Texas, Judge Ewing Werlein presiding, December 6, 1995, in the case of Trail Enterprises, Inc., d/b/a Wilson Oil Company v. City of Houston, Number H-95-3958, granting Petitioner's Motion to Remand is reported at 907 F. Supp. 250 (S.D.. Tex. 1995), and is reproduced as Appendix G.

## STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Fourteenth State Court of Appeals, Houston, Texas, of November 20, 1997. A timely extension of time to file the Petition For Review was filed on December 31, 1997, and was granted to and including February 4, 1998. ( App. H). The Petition for Review to the The Supreme Court of Texas was filed February 3, 1998.( App. I). The Supreme Court of Texas denied the Petition For Review on July 3, 1998.(App. E). A timely extension of time to file a Motion For Rehearing with the Supreme Court was granted on July 22, 1998, granted to and including August 4, 1998. (App. J) . Petitioner's Motion For Rehearing was filed August 3, 1998. (App. K). On September 3, 1998, the Supreme Court of Texas overruled Petitioner's Motion For A Rehearing. (App. F). The Supreme Court of the United States has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257 (a).

## CONSTITUTIONAL PROVISIONS AND ORDINANCE AND CITY CODE PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law, [N]or shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Article I, § 10, clause 1 of the United States Constitution provides in pertinent part: "No State shall . . .pass any . . . law impairing the Obligation of Contracts."

City of Houston Ordinance 65-912, enacted May 19, 1965, is codified as Article IV. Water Supply Protection, Section 23. Pertinent

parts are § 23-101(1), which defines the "control area," and § 23-101 (10), which defines the "watershed." (App. T).

City of Houston Ordinance 67-2544, enacted December 20, 1967, amended Ordinance 65-912 above, by adding a definition of a "well" to Article IV, Water Supply Protection, Section 23, as § 23-101(11). The Ordinance also created a new Section 23-102, which provides in pertinent part: " No well shall be drilled within the control area of Lake Houston which is nearer than one thousand (1,000) feet from the normal water's edge of Lake Houston or of any of its drains, streams, or tributaries. In addition, no well shall be drilled within such control area at an elevation of less than forty-eight (48) feet above mean sea level." The validity of Ordinance 67-2544 is the primary issue in this litigation.(App. L).

Page references are to the versions in the Appendix.

## STATEMENT OF THE CASE

### A. Procedural History

Petitioner, Wilson Oil Company, on October 2, 1993, addressed a fourteen page claim letter to the Mayor of Houston, alleging that Respondent had been damaged in the amount of $3,612,000.00 by City of Houston Ordinance 67-2544. The letter alleged violations by Respondent of the Due Process, Equal Protection, and Takings clauses of Fifth and Fourteenth Amendments and of Article I, § 10, clause 1 of the United States Constitution. In the section concerning due process rights the Petitioner cited this Court's opinion in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). In the section concerning Equal Protection this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) was cited. On Page 6, the Petitioner alleged the Respondent had unilaterally abrogated its own contractual obligations and destroyed Petitioner's contractual rights, in violation of Art. I, § 10, clause 1 of the United States Constitution. Petitioner alleged on pages 8 to 11, inclusive, that Respondent had taken its property for public use and without the payment of just compensation in violation of the Fifth Amendment to

the United States Constitution. Petitioner cited the case of *Com. Ex. Rel Keator v. Clearview Coal Company* 256 Pa. 328, 100 Atl 820 (1917) and the decisions of this Court in *Pennsylvania Coal Company v. H.J. Mahon*, 260 U.S. 393 (1922) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987). (Exhibit 24, Pl's Mot for Part S/J).

On June 9, 1994, the City Attorney of Houston, Mr. Benjamin L. Hall, III, notified Petitioner that the City found Wilson Oil Company's claim "to be without merit." (App. N.)

On December 9, 1994, Petitioner made demand upon the Respondent to grant Petitioner a variance hearing for the purpose of exempting Wilson Oil from the provisions of Chapter 23, Section 102 of the City Code of Houston, Texas, so that a permit to drill for oil and gas on Petitioner's leases would not contain the prohibition against drilling within 1,000 feet of the normal waters edge of Lake Houston, or any of its drains (including man-made drains), streams or tributaries. The City did not respond to this letter. (App. O).

On March 2, 1995, Petitioner amended its variance request to show that the Ordinance prevented drilling anywhere on Petitioner's 885 acre lease. The City did not respond to this letter. (App. P.)

Petitioner filed its original petition in the 80th District Court of Harris County, on June 26, 1995, alleging two causes of action: (1) for a declaratory judgment that City of Houston Ordinance 67-2544 was unconstitutional and void as applied to Petitioner because the Ordinance violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments and violated Petitioner's protection against the impairment of its contracts, as guaranteed by Article I, Section 10, Clause 1, all being part of the United States Constitution; and (2) for the inverse condemnation of Petitioner's property in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The Attorney General of Texas was notified therein that the constitutionality of an Ordinance was at issue in the case.

On August 2, 1995, the Respondent filed its original answer and a Motion To Remove the cause of action to the federal district court on the grounds that Petitioner asserted violations of its rights under the United States Constitution.

On August 7, 1995, the Attorney General of Texas advised that because neither the constitutionality nor the validity of a state statute was involved he declined to participate in the case.

On August 24, 1995, Petitioner filed its motion to remand the case to the state court system.

On September 13, 1995, the Respondent filed its Response to Plaintiff's Motion to Remand and said as justification for removal to federal court that Petitioner attacked the federal constitutionality of City of Houston Ordinance 67-2544 because it had alleged violations of the Fifth and Fourteenth Amendments and Article I, § 10, clause 1 of the United States Constitution.

On December 6, 1995, Judge Ewing Werlein, U.S. District Judge, remanded the case to the 80th Judicial District of Harris County, Texas. 907 F. Supp. 250 (S.D. Tex. 1995). Judge Werlein acknowledged Petitioner's request for a declaratory judgment that the Ordinance was void, but elected not to bifurcate the case and remanded both causes of action to the state court. (App. G).

On February 5, 1996, Petitioner filed its First Amended Original Petition. The amended Petition was identical to the Original Petition except for the addition of the words that the property was taken from Petitioner "without its consent." App. Q.

On February 5, 1996, Petitioner filed its Motion For A Partial Summary Judgment (App. R ) with thirty written documents attached thereto. Federal cases cited in the Motion include: *Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980), cert. denied, 450 U.S. 1029, (1981); *Armstrong v. United States*, 364 U.S. 40 , 80 Sup. Ct. 1563, 1569 (1960); *Nollan v. California Coastal Commission*, Id.;

*Pennsylvania Coal v. Mahon*, Id.; and *First English Evangelical Lutheran Church*, Id.

On March 4, 1996, the Respondent filed its own Motion for Final Summary Judgment, which submitted no controverting evidence and plead only that Petitioner's claims were barred by two provisions of the statute of limitations.

On April 1, 1996, Judge Scott Link, 80th Judicial District Court, Harris County, Texas, granted Respondent's Motion for a Final Summary Judgment. App. C.

On April 3, 1996, Judge Scott Link, 80th Judicial District Court, Harris County, Texas, denied Petitioner's Motion for a Partial Summary Judgment. App. D.

Petitioner thereafter perfected its appeal to the Fourteenth State Court of Appeals, Houston, Texas. Petitioner filed its Brief on July 25, 1996, and cited therein ten points of error. Petitioner's Point of Error No. 6 alleged Respondent had deprived Wilson Oil of its property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Cases cited thereunder were *Williams v. Texas Tech University Health Science Center*, 6 F.3d 290, 292-93 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1301 (1994); *Shawgo v. Spradlin*, 701 F.2d. 470, 480 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 404 (1983); and *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1411 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1221 (1988). Petitioner's Point of Error No. 7, alleged that the Respondent had denied it the equal protection of the law as required by the Fifth and Fourteenth Amendments to the United States Constitution, citing *Armstrong v. United States*, Id. at 80 Sup Ct. 1569; and *Mahone v. Addicks Utility District of Harris County*, 836 F.2d 921,932 (5th Cir. 1988). Petitioner's Point of Error No. 8, alleged the Respondent had impaired unilaterally Petitioner's contractual rights and abrogated its own contractual obligations in violation of the Contract Clause of the United States Constitution, citing therein the opinion of this Court in *General Motors Corporation v. Romein*, 503 U.S.181, 112 S.Ct. 1105. 1109-10 (1992).. Petitioner's Point of Error No.10 alleged the

Respondent had created an act of inverse condemnation of Petitioner's property in violation of the Fifth Amendment of the United States Constitution, citing *Pennsylvania Coal,* Id.

On March 12, 1997, the Petitioner filed its Brief in Rebuttal of the Brief of Appellee with the Fourteenth State Court of Appeals. On pages 11, 27, and 29 it cited recent decisions of this Court in *United States v. Winstar,* 116 S.Ct. 2432, 2466. 2473 , and 2477 and *Winstar Corporation v. United States,* 64 F.3d 1531, 1551 (Fed. Cir. 1995). Those decisions related to an enactment of Congress wherein the United States Government unilaterally abrogated its own contractual obligations.

On November 20, 1997, the Fourteenth State Court of Appeals issued its opinion and judgment wherein it affirmed the decision of the trial court.. (Apps.. A & B, respectively).

On January 2, 1998, the Supreme Court of Texas granted Petitioner's Motion for an Extension of Time to file a Petition for Review to February 4, 1998. App. H.

On February 3, 1998, Petitioner timely filed its Petition For Review with the Supreme Court of Texas, citing therein violations of the Fifth and Fourteenth Amendments and Article I, § 10, clause 1 of the United Case Constitution. Petitioner also cited the case of *United States v. Winstar,* 116 S.Ct. 2432, 2477, Id. (App. I, Page 6).

On March 4, 1998, the Defenders of Property Rights filed an *amicus brief* in the Supreme Court of Texas, in support of Petitioner. Cited therein were *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.,* 452 U.S. 264 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); and *MacDonald, Sommer, & Frates v. Yolo County,* 477 U.S. 340 (1986).

On April 30, 1998, the Supreme Court of Texas requested the record from the Fourteenth Court of Appeals..

On July 3, 1998, the Supreme Court of Texas denied Wilson Oil's Petition For Review. App. E.

On July 22, 1998, The Supreme Court of Texas granted Petitioner's unopposed Motion for an Extension of Time to file a Motion for a Rehearing until August 4, 1998. (App. S).

On August 3, 1998, Petitioner timely filed a Motion For Rehearing with the Supreme Court of Texas. Petitioner cited therein violations of the Fifth and Fourteenth Amendments and Article I, § 10, Clause 1 of the United States Constitution. Petitioner cited therein the federal cases of: *United States v. Winstar*, Id. at 2473; *Florida Rock Industries, Inc. V. United States*, 8 Cl. Ct.160, 171, (1985) affirmed in part, 791 F.2d 893 (Fed. Cir. 1986; *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153, 154-58 (1990) *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-19, 112 S.Ct. At 2893-94; *Del Monte Dunes at Monterey, Ltd. V. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996); *Park Avenue Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2d. Cir 1984) *cert denied*, 470 U.S. 1087 (1985); *Monongahela Navigation Company v. United States*, 148 U.S. 312, 326 (1893); and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 501, 94 L.Ed.2d 472, 107 S. Ct. 1232 (1987). (App. K)

On August 21, 1998, Cary M .Maguire, President of Maguire Oil Company, filed an *amicus brief* in the Supreme Court of Texas in support of Petitioner. Cited therein were *Willliamson County v. Hamilton*, Id., and *MacDonald, Sommer, & Frates v. Yolo County*, Id.

On September 3, 1998, the Supreme Court of Texas overruled Petitioner's Motion For A Rehearing. App. F.

On October 21, 1998, Howard W. Edmunds addressed a letter to Mr. John T. Adams, Clerk, Supreme Court of Texas, where he was requested to ask Chief Justice Thomas R. Phillips to sign a certificate to the United States Supreme Court. App. W.

The certificate cited above was a statement by Chief Justice that stated that Petitioner's federal constitutional allegations "were considered and passed upon by this Court." App. X.

On October 27, 1998, Mr. John T. Adams, Clerk, Supreme Court of Texas, addressed a letter to Howard W. Edmunds wherein he advised that Chief Justice Thomas R. Phillips had declined to sign said certificate. App. Y.

B. The Case

Petitioner, Trail Enterprises, Inc., d/b/a Wilson Oil Company is the owner of an oil and gas lease on 885 acres out of a 985 acre mineral tract owned by the Heirs of Carrie B. House. The oil and gas lease owned by Petitioner is derived from a lease granted to Producers Oil Company in 1912. In 1948, the mineral owner, Carrie B. House, executed a deed to the City of Houston of the surface interest only of 45.9 acres out of the 985 acre tract. The land was purchased for the purpose of constructing Lake Houston. The deed was subject to the mineral lease to E.M. Wilson, Petitioner's predecessor in title, and others, and a reservation by the Grantor, and her assigns, of the right to drill and operate oil and gas wells on the oil and gas leases. The deed also provided that any such drilling, exploration or production would be conducted in accordance with the rules and regulations of the Railroad Commission of Texas. The only right given the Respondent by those instruments was to have an observer present while such drilling was being performed. Under Texas real property law such a reservation is found to run with the land, and when no duration is expressed therein, it runs forever. *Morton v. Sayles*, 304 S.W.2d 759, 763 (Tex. Civ. App. - Eastland, 1957, writ ref'd. n.r.e.), citing 21 C.J.S. Covenants § 74, p. 933. . The transaction was approved by Respondent's City Council in Motion No. 4600, September 15, 1948.

On March 27, 1954, the City and E.M. Wilson d/b/a Wilson Oil Company executed a contract with Respondent wherein the City agreed, for valuable consideration, agreed to pay Wilson to raise mounds for the purpose of elevating 12 wells that would be inundated when the City completed the construction of Lake Houston. The City agreed to pay the construction costs of the mounds, and Wilson Oil

agreed to release the City from damages to a portion of the leasehold estate caused by the inundation. Wilson also agreed that all future drilling, exploration, and production accomplished in connection with the lease would be done in such a manner as not to endanger, damage or pollute the reservoir or source of water supply. Paragraph V of the Agreement read: "The terms, provisions and covenants hereof shall extend to, be binding upon, and inure to the benefit of the parties hereto, their respective assigns and successors in interest, and it is agreed that the terms and provisions of this agreement shall constitute covenants running with the land and leasehold estate in the above described premises." The transaction was approved by Respondent's City Council by Ordinance No. 57. April 28, 1954.

On May 19, 1965, the City of Houston adopted Ordinance No. 65-912, the "Lake Houston Ordinance,." and made no reference therein to oil and gas drilling. (App. T.)

On October 24, 1967, Mr. E. B. Cape, Director of the Public Works Department of the City of Houston sent an inter-office correspondence message to Mayor Louis Welch, that his department "has had a great number of complaints in recent months with reference to the drilling of oil wells in the control area of Lake Houston." Accompanying the correspondence was a draft of the proposed Ordinance, which shortly thereafter became Ordinance 67-2544, the subject of this litigation.

On December 20, 1967, the Respondent amended Ordinance 65-912 by enacting Ordinance 67-2544, which added a new section to be numbered " Section 2A,". The Ordinance prohibited the drilling of oil and gas wells within the control area of Lake Houston nearer than 1000 feet from Lake Houston or any of its drains, streams or tributaries. (App L)

On April 1, 1972, the Heirs of E.M. Wilson assigned to Forest Cove Development Company, "all rights, titles, and interests of the original lessee and present owners in and to the above described oil, gas and mineral lease . . . and all rights thereunder insofar as it covers all of the oil, gas and other minerals to a depth of 4,500 feet . . ."

On May 29, 1986, Forest Cove Development Company, a Texas corporation, assigned to its wholly owned subsidiary, Trail Enterprises, Inc., all of its rights, titles, and interests in said leases to a depth of 4,500 feet. Trail Enterprises, Inc. is a Texas corporation, and operates doing business as "Wilson Oil Company."

## ARGUMENT

### REASONS FOR GRANTING THE WRIT

**SUPREME COURT RULE 10 (B) LISTS AMONG THE CONSIDERATION GOVERNING REVIEW ON CERTIORARI THE CIRCUMSTANCE WHEN A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF UNITED STATES COURTS OF APPEALS. UNDER RULE 10 (C), A GROUND FOR REVIEW EXISTS WHEN A STATE COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, OR SHOULD BE, SETTLED BY THIS COURT, AND HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. ALL OF THESE GROUNDS FOR REVIEW ARE PRESENT IN THIS CASE.**

### I.

### Petitioner's First Cause of Action
### A Declaratory Judgment That Ordinance 67-2544 Is Void

**A. The lower courts violated Petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by not adjudicating Petitioner's First Cause of Action that Ordinance 67-2544 was unconstitutional and void because of multiple constitutional violations.**

An unconstitutional statute is in reality no law but is wholly void and ineffective for any purpose. The unconstitutionality dates from the time of its enactment. It is inoperative as if it had never been passed and never existed, that is, it is void ab initio. 16A Am Jur 2d, Constitutional Law, § 203, page 90.[1]

Furthermore, the fact that Petitioner did not challenge the constitutionality of the Ordinance until twenty-six years after it was enacted is not important. History alone cannot validate a practice that violates constitutional law. *Marsh v. Chambers,* 463 U.S. 783, 790 (1983). As this Court observed,

> . . . no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. *Walz v. Tax Commissioner,* 397 U.S. 664, 678, 90 S. Ct. 1409, 25 L.Ed.2d 697 (1970).

Because Petitioner alleged three constitutional violations, it was the duty of the court of appeals to first determine the validity of the Ordinance. If Petitioner's documentary evidence showed that when the Ordinance was enacted it violated any one of the alleged constitutional provisions, it was then the duty of the court to reverse the judgment of the trial court and award judgment to Petitioner on its First Cause of Action. By applying a statute of limitations to deny Petitioner's allegations of unconstitutionality the lower courts denied Petitioner's due process constitutional rights.

> The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the

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[1] Accord, *Commissioner of Roads and Revenues of Fulton County v. Davis,* 213 Ga. 792, 102 S.E.2d 180, 182-183 (1958); *Reyes v. State of Texas,* 753 S.W.2d 382, 383-84, (Tex. Crim. App. 1988); *Hunter v. School District of Gale-Ettrick-Trempealeau,* 97 Wis. 2d 435, 293 N.W.2d 515, 519-20 (1980).

> constitution should not be decided without examining the instrument under which it arises? , , , That is too extravagant to be maintained. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 179, 180 (1803).

It was error for the court of appeals to not first determine the constitutionality of the Ordinance.

Supreme Court Rule 10 (c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided an important questions of federal law that has not been, but should be, settled by this Court.. However, In this case, the courts below have **not decided** an important question of federal law that should be settled by this Court. That question is, "was the enactment of Ordinance 67-2544 unconstitutional and void as applied to Petitioner?" The state court's refusal or failure to articulate its denial of the federal claims, however, is just as reviewable by this Court as an express decision on the point.[2] Furthermore, the refusal of the court of appeals to deal with Petitioner's First Cause of Action was mere evasion to avoid having to decide what could be an unpopular decision.[3] For these reasons Petitioner requests this Court to grant this Writ of Certiorari.

An examination of the documented facts show that Respondent violated Petitioner's procedural and substantive due process rights, equal protection rights, and rights against the impairment of its contracts with Respondent, all in violation of the Fifth and Fourteenth Amendments and Article I, § 10, clause 1 of the United States Constitution. To declare Ordinance 67-2544 void, however, it is only necessary to find that Respondent violated just one of these constitutional provisions. In such a case, the Petitioner would be entitled to a declaratory judgment that Ordinance 67-2544 was unconstitutional and void, as applied to Petitioner.

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2. *New York ex rel Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928).

3. *Rogers v. Alabama,* 192 U.S. 226, 230-31 (1904).

**B. Procedural Due Process. The decision of the Court of Appeals was erroneous because it found that Petitioner's allegations and evidence of denial of procedural due process that surrounded the enactment of the Ordinance were not relevant and material because Petitioner did not own the mineral interests when the Ordinance was passed in 1967.**

In asserting a procedural due process violation, a plaintiff must first demonstrate that he or she has a protected property interest.[4] Property interests are not created by the Constitution; instead, they are created by existing rules and understanding that stem from an independent source such as state law.[5]

Under Texas property laws the reservations and agreements in the 1948 deed and the 1954 contract are covenants which run with the land. A covenant which runs with the land accompanies a conveyance of the land, and passes from one purchaser to another through each successive link.[6] " Where a covenant is annexed to an estate, in the absence of a breach it runs as long, as does the estate." 21 C.J.S. § 74, p. 933.

Forest Cove Development Company, the parent corporation of Petitioner, acquired its interest in the oil and gas lease by purchase from the Heirs of E.M. Wilson in 1972, five years after the enactment of the Ordinance. The purchase was accomplished by valid assignments of all of the assignors "rights, titles, and interests." in and to said oil and gas lease. Subsequently, in 1986, Forest Cove Development Company assigned all of its "rights, titles, and interests" in the leases to Petitioner, its wholly owned subsidiary.

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[4] *Watson v. University of Utah Medical Center*, 75 F.3d 569, 577, 106 L.Ed. Rep. 1030 (10th Cir. 1996).

[5] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 1492, 84 L.Ed. 2d, 494 (1985).

[6] *Morton v. Sayles*, 304 S.W.2d 759, 763 (Tex. App. - Eastland 1957), citing *Flaniken v. Neal*, 67 Tex. 629, 4 S.W. 212, 214 (1887).

This Court held in *Monongahela Navigation Company v. United States,* 148 U.S. 312, 326 (1893), that the term "property" as used in the Fifth Amendment to the United States Constitution, meant that the violation was to the property itself and not to the owner. "Every other clause in this Fifth Amendment is personal." Petitioner acquired all of the rights in the property and therefore held, and still holds, the required ownership of property that is necessary to prosecute a due process violation. If Petitioner had inherited the mineral lease in 1972 there would be no question as to its standing to have the Ordinance declared unconstitutional. Acquiring a property right by purchase is no different. If such was not the case the reservations in a deed to a municipality and the contractual agreements of a municipality would be meaningless. Nevertheless, the Fourteenth Court of Appeals held:

> [a]ppellant did not own the mineral interest when the Ordinance was passed in 1967. Therefore, facts surrounding the passage of the Ordinance are immaterial. (App. A, Page 12).

The documented facts surrounding the enactment of the Ordinance, however, are very material. When those facts are fully examined the only conclusion that can be reached is that the Ordinance was invalid, as applied to Petitioner, when it was enacted. It was a violation of procedural due process rights as protected by the Fifth and Fourteenth Amendments to the United States constitution.

Petitioner's summary judgment evidence showed that when the Ordinance was enacted the Respondent violated all of the elements of due process:

> (1) notice; (2) a neutral arbiter; (3) the opportunity to testify; (4) the right to present evidence; (5) the opportunity to cross-examine witnesses; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of the reasons for the result. *Rogin v. Bensalem Township,* 616 F.2d 680, 694 (3d Cir. 1980), cert denied, 450 U.S. 1029, 101 S.Ct. 1737, 68 L. Ed.2d 223 (1981), citing J. Nowak,

R. Rotunda & J. Young, Constitutional Law 488-503 (1978) and cases collected therein.

Respondent presented no evidence that it had satisfied even one of the above constitutional due process requirements. The only due process evidence in this case was furnished by Petitioner in its Exhibits In Support of its Motion for a Partial Summary Judgment. Exhibit 16, the Agenda of the City Council meeting of December 20, 1967, read: "(m.) Amend Sec 1 of Ord. No. 65-912 passed May 19, 1965, regulating controlling & prohibiting pollution of Lake Houston." The above agenda item provided no notice to oil and gas operators and particularly to those operators, like Petitioner, who were not located within the city limits of Houston.

Exhibit 17, the Minutes of the Meeting of the City Council of December 20, 1967, shows only this cryptic information regarding the passage of Ordinance 67-2544: "Ordinances No. 67-2533 to 67-2545." Either Ordinance 67-2544 was not important enough to be discussed and passed as a separate ordinance or the city officials chose to bury the ordinance with a group of twelve other new ordinances. The procedure used by Respondent when it enacted the Ordinance lacked fundamental fairness.

In *Mullane v. Central Hanorver Bank & Trust Co.*[7] this Court established that notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. In *City of Houston v. Fore,*[8] the Texas Supreme Court held in February, 1967, that the Respondent did not provide sufficient notice to a property owner when the only notice provided was by citation by publication, citing *Mullane.* Nevertheless, just ten months later the Respondent adopted Ordinance 67-2544 without providing property owners any notice. The complete lack of notice is proof that Respondent was well aware that it was required to provide

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[7] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 659, 94 L.Ed. 865 (1950).

[8] *City of Houston v. Fore*, 412 S.W. 2d 35, 39 (Tex. 1967),

notice to the affected mineral interests, but deliberately ignored those constitutional requirements.

Respondent also denied procedural due process to Petitioner by not granting the Petitioner's request of December 9, 1994, for a variance hearing.

Furthermore, the Respondent is the largest municipality in the United States without zoning powers and, therefore, the property was not afforded the procedural due process protections that are built into zoning enabling statutes by the State Legislature.

The enactment of the Ordinance was a deliberate violation of Petitioner's due process rights. The Petitioner was entitled to a declaratory judgment that Ordinance 67-2544 was unconstitutional as applied to Petitioner.

Clearly, it was erroneous for the appellate court to find that facts surrounding the passage of Ordinance 67-2544 were immaterial. This Petition should be granted to resolve the conflict between the court below and the decisions of this Court, and other State and Federal Courts.

**C. Substantive Due Process. The decision of the Court of Appeals was erroneous because it denied Petitioner's claim that the Ordinance deprived it of substantive due process because the Ordinance mandated a complete ban or drilling and contained no provisions for a variance hearing.**

The City Code provisions contain no provision for a hearing or the opportunity to receive a variance or exception to the prohibition against drilling. This arbitrary provision is a denial of substantive due process because it denies to Petitioner its only opportunity to drill for oil and gas, which is the only use it can perform. Petitioner advised Respondent in its letters requesting a variance that the Ordinance completely denied Petitioner the opportunity to drill anywhere on its 885 acre lease. Under those conditions, even directional drilling was not possible. Respondent refused to grant the variance request by its refusal to answer Petitioner's claims. The enactment and enforcement of the

Ordinance was a denial to Petitioner of its substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The denial of a variance hearing was another denial of Petitioner's substantive due process rights under those same constitutional provisions.

**D. Equal Protection. The decision below was erroneous because the Respondent treated Petitioner different than other similarly situated landowners without any reasonable basis.**

The Court of Appeals found that "to pass equal protection scrutiny under a rational basis review, an ordinance's classification must be rationally related to a legitimate state interest . . . . We hold the Ordinance is a valid exercise of the City's police power as a matter of law." The Ordinance is codified as part of Chapter 23, Article IV, Water Supply Protection, of the City Code of Ordinances. Section 23-101 (1) defines the *Control area*, as: "[t]hat land contained in the *extraterritorial jurisdiction* of the city, which contains waters that flow into or adjacent to the watershed of Lake Houston." (Emphasis added). Section 23-102 (Ordinance 67-2544) provides that no well shall be drilled in the *Control area* of Lake Houston which is nearer than 1,000 feet from Lake Houston, its drains, streams or tributaries. The Ordinance by only preventing drilling in the extraterritorial jurisdiction and not preventing drilling on land located within the city limits even though such lands were similarly situated to Lake Houston denied to Petitioner the equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Ordinance was not rationally related to a legitimate state purpose. The Texas Legislature has given the power to regulate the drilling of oil and gas wells to the Texas Railroad Commission. On August 14, 1990, a letter prepared by Don Walker, Legal Examiner, Railroad Commission of Texas, stated:

> Current Commission rules are not structured to limit drilling according to the proximity to fresh water. Consequently, the rules do not prohibit drilling within specified distances of fresh water, whether it is used for potable water or not. I understand that there are

wells in and near lakes and rivers in Texas. (App. U.)

The Ordinance deprived Petitioner of equal protection under the law by having it bear all of the cost of protecting the water supply, "which in all fairness and justice, should be borne by the public as a whole."[9]

The decision of the Fourteenth States Court of Appeals is directly in contradiction to the equal protection clause of the Fifth Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment of the United States Constitution. The decision is also in contradiction to the above cited cases of this Court.

E. **Impairment of Contracts. The decision of the Court of Appeals was erroneous because it held that the Respondent had not acted in derogation of its contract with Petitioner or of the mineral reservation in its deed because of an allegation in a letter by a city official about receiving a great number of complaints about drilling in the control area of Lake Houston, and this allegation allowed Respondent to plead the statute of limitations to deny Petitioner's impairment of contract claims.**

With the enactment of Ordinance 67-2544, the Respondent took from Petitioner the rights conferred by the 1948 deed and the 1954 contract, the provisions of which constituted covenants running with the land. Any law that changes the intent and legal effect of the original parties, giving to one a greater or the other a lesser interest or benefit of the contract, impairs its obligation. *Kentucky Utilities Co. v. Carlisle Ice Co.*, 279 Ky. 585, 131 S.W.2d 499, 504 (1939). Ordinance 67-2544 offended the constitutional prohibition against the enactment of laws impairing the obligations of contracts because it changed the substantive rights of the parties to the contracts and agreements. Furthermore, to take from an oil and gas operator its right to drill is to substantially impair its contract. Thus, Petitioner's summary judgment evidence established as a matter of law, and the

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[9] *Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563, 1569, 4 L.Ed. 2d 1554, 1561 (1960).

court's opinion substantiated, that all of the requirements for an impairment of contract challenge had been met: (1) there was a contractual relationship between the parties; (2) a change in the law impaired that relationship; and (3) the impairment was substantial.[10]

The court of appeals admitted the existence of the contractual rights and obligations of both parties, but concluded that the Respondent had not acted in derogation of its contract because drilling was permitted drilling only if there was no pollution of the lake, holding:

> In addition, the City has not acted in derogation of its contract with Wilson or the mineral reservation in its deed. Both permitted drilling only if there was no pollution of the Lake. The record indicates that the Ordinance was passed after a 'great number of complaints' about drilling in the control area of Lake Houston. In October 1967, the Director of the Department of Public Works wrote the mayor that '[t]he wells that have been drilled have caused a degree of pollution of the Lake waters by the drilling of oil wells, thereby allowing pollutants to seep or flow into ditches, reservoirs, and gullies that ultimately drain or wash into the lake. We determine that appellant's estoppel and contract claims do not preclude the City from asserting its limitations defense as a matter of law. . . . In conclusion, appellants cause of action for inverse condemnation is barred by limitations and the City is entitled to summary judgment as a matter of law. We overrule appellant's points of error one through four and eight. (App. A, pp 11-12).

Petitioner's Point of Error No. 8, was that the trial court had erred in denying Petitioner's Motion for a Partial Summary Judgment because

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[10] *General Motors v. Romein*, 503 U. S. 181,112 S. Ct. 1105, 1109-10, 117 L.Ed.2d 328 (1992).

the Respondent had impaired the contractual rights of Petitioner in violation of Article I, § 10, clause 1 of the United States Constitution.

Thus, the appeals court found that even though the Respondent had impaired Petitioner's contractual rights, the police power of the municipality gave it the right to impose a statute of limitations to prevent Petitioner from asserting those rights.

The Respondent did not offer any evidence to demonstrate that Petitioner had lost any of its rights held under the deeds, reservations, contracts, and covenants running with the land created in prior agreements, executed and recorded. The written agreements executed by Respondent in the 1948 and 1954 transactions were essential parts of the consideration of the consideration executed by Petitioner's predecessors in title. The very subject matter of these agreements, an essential part of the *quid pro quo,* was that future drilling would be regulated by the Railroad Commission of Texas; unless the municipality is bound by its agreements to not interfere with oil and gas drilling, the Respondent's agreements are meaningless. *U.S. v. Winstar,* Id. at 116 S.Ct. 2432, 2477.

The court of appeals also concluded that the Respondent had not acted in derogation of its contract with Petitioner, or of the mineral reservations in the deed, because both permitted drilling only if there was no pollution of the Lake. It then concluded that an allegation in a letter from the Director of the Department of Public Works to the Mayor that there had been a "great number of complaints" about drilling in the Control Area and that "wells that have been drilled have caused a degree of pollution of the Lake waters . . ," was sufficient justification for that court to determine that appellant's estoppel and contract claims did not preclude the City from asserting its limitations defense as a matter of law. ( App. A, page 12.)

By holding that it was not necessary to determine the validity of Petitioner's contract claims because those claims were barred by the statute of limitations, the appeals court ruled that the statute of limitations had replaced the Constitution as the paramount law of the land. A statute of limitations has no bearing upon the determination of the validity of an ordinance and the ruling of the court of appeals is

clearly erroneous. The only question that should have been asked by the court of appeals was, "when the Ordinance was enacted did it impair Petitioner's contractual rights it held with Respondent?"

Furthermore, it was erroneous for the court of appeals to conclude that the allegation of "pollution" in a letter from a city official to the mayor was a valid justification for the Respondent to justify the enactment of the Ordinance. In order to invoke the "nuisance" exception so as to allow the municipality to use its police power to restrict an activity on property the Respondent must show that:

> Any such law, however, which restricts an activity on property must show the restricted activity could have been prohibited under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally. . . . The fact that a particular use has long been engaged in by similarly situated land owners ordinarily indicates a lack of any common-law prohibition. . . . So also does the fact that other landowners similarly situated are permitted to continue to the use denied to claimant. *Lucas*, id. at 112 S.Ct. 2886, 2901.

The conclusion of the court of appeals that the drilling of oil and gas wells on Petitioner's property amounted to a nuisance and, therefore, the statute of limitations applied to Petitioner's impairment claims was in direct contradiction of the rulings of this Court and of the Supreme Courts of other states and Federal Courts of Appeal. For these reasons, the Petitioner requests this Court to grant this Writ of Certiorari.

### F. Conclusion regarding Petitioner's First Cause of Action

Petitioner established clearly that Ordinance 67-2544 violated its protected rights afforded it by the Fifth and Fourteenth Amendments and Article I, § 10, clause 1 of the United States Constitution. It is important for this Court to decide if a statute of limitations may be imposed so as to validate an unconstitutional ordinance. It is also

important for this Court to reverse the finding of the lower court which permitted the Respondent to utilize its police powers by the simple invocation of the word "pollution." These are important public policy questions that should be answered by this Court. For these reasons, we ask this Court to grant this Writ of Certiorari.

II

**Petitioner's Second Cause of Action**
**Inverse Condemnation**

**A. The Court of Appeals erroneously held that Petitioner's cause of action for inverse condemnation was barred by limitations and the Respondent was entitled to a summary judgment as a matter of law.**

Petitioner's documentary evidence established clearly that Respondent had taken its property in violation its rights under the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment, to the United States Constitution. The opinion of the court of appeals was in direct contradiction to the Supreme Court of Pennsylvania in the *Clearview Coal Company case*[11] and of this Court in the *Pennsylvania Coal Company* case.[12] The court of appeals concluded, however, that a simple allegation of "pollution" in the control area of Lake Houston was sufficient justification for Respondent to invoke its police powers to enact the Ordinance:

> We determine that appellant's estoppel and contract claims do not preclude the City from asserting its limitations defense as a matter of law. . . .In conclusion, appellant's cause of action for inverse condemnation is barred by limitations and the City is

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[11] *Commonwealth ex. rel Keator v. Clearview Coal Company*, 256 Pa. 328, 100 Atl. 820, 821 (1917).

[12] *Pennsylvania Coal Company v. H. J. Mahon*, 260 U.S. 393, 43 Sup. Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321, (1922).

> entitled to summary judgment as a matter of law." (App. A, page 12).

The validity of an ordinance, however, is determined when the Ordinance is enacted. An invalid and unconstitutional ordinance cannot be made valid by a statute of limitations. Because the Ordinance was invalid there was no ordinance against which a statute of limitations could run.

The appeals court then made a truly "novel" ruling: It concluded in Note [5] (App. A. pages 10-11):

> The City is not, as appellant argues, attempting to negate appellant's *title* to the mineral interests by virtue of its leasehold interest in the minerals, but its ability to produce them has been restricted. If appellant has defeated the City's claim of a valid use of its police powers and established that the ordinance constituted a taking, i.e., that it could not obtain access to the minerals through directional drilling or any other means, then it would have been entitled to compensation had it brought its claim within the limitations period. (Emphasis in original).

Thus, the court of appeals concluded that if the Ordinance was unconstitutional and void when enacted that the Petitioner could have successfully sued for inverse condemnation if the action had been filed within the period of the ten-year statute of limitations. It also concluded, however, that because the Petitioner did not file this litigation within said ten-year period that the Ordinance then became valid.

This ruling is contradictory to the general rule that an unconstitutional statute is wholly void and ineffective for any purpose. Such an unconstitutional law is treated as if it had never been passed and never existed, that is, it was void ab initio. 16A, Am Jur 2d, Constitutional Law, § 203, page 90, and cases cited therewith, supra.

*Pennsylvania Coal,* is the landmark case in modern taking jurisprudence. Its facts are almost identical to the facts and issues of the case at bar, except for the fact that the Respondent herein intentionally abrogated its own covenants and obligations incurred in prior contracts and agreements with Petitioner. In *Pennsylvania Coal,* the Pennsylvania legislature enacted the Kohler Act which declared mining to be such an operation that it threatened to be a public nuisance. The State sued under the Kohler Act to prevent the coal company from mining beneath a residence where the coal company had expressly reserved the right to drill for coal and the purchaser waived all claims against the coal company for damages that may arise from mining coal. The Supreme Court of Pennsylvania acknowledged that the coal company had contract and property rights, but held the Kohler Act was a legitimate exercise of the police power and directed a decree for the State. This Court in *Pennsylvania Coal* reversed and held:

> It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine coal has been reserve." *Pennsylvania Coal*, Id. at 43 Sup. Ct. 160.

> "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them of greater rights than they bought. Decree Reversed." *Pennsylvania Coal,* Id at 43 Sup. Ct. 160.

**B. The appeals court erred in applying the Nuisance Exception so as to allow Respondent to utilize its police powers to justify the enactment of Ordinance 67-2544.**

The nuisance exception to the takings clause allows government to prevent misuse or illegal use of property.[13] The Court of Appeals has expended the exception by holding, in effect, that a single

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13 *Curtin v. Benson,* 222 U.S. 78, 32 Sup. Ct. 31, 33 (1911).

allegation of "pollution" by a city official justifies the use of the City's police power to fit the exception. This holding eviscerates the long-standing rule that the government must compensate those whose legitimate property interests are diminished by legitimate regulation. This Court specifically rejected this position in *Keystone*[14] when it said that the "(nuisance exception is not coterminous with the police power.)"

No evidence of pollution by Petitioner was alleged or offered. No evidence of any court action was offered to show that Respondent had attempted to stop an alleged pollution violation by any oil and gas operators.

A municipality cannot simply invoke the term "pollution" and thereby foreclose a plaintiff's right to compensation under the Fifth Amendment.

> Government may not circumvent the takings clause by defining an activity as pollution and rendering it noxious by fiat. Pollution as that terms is understood, involves serious adverse physical effects upon the health, welfare or property of others. To avoid the payment of compensation on this theory, the government must show the prohibited activity in fact causes harm. *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 171 (1985), affirmed in part in 791 F.2d 893 (Fed. Cir. 1986).

**C. The court of appeals erred by not applying a heightened level of scrutiny that applies when a governmental entity is a party to the contract.**

When Respondent enacted Ordinance 67-2544 it not only impaired Petitioner's property rights under the 1948 deed and the 1954 contract, rights which the Respondent itself had granted, but it also

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14 *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 490-92, 107 Sup. Ct. 1232, 1245, (1987).

abrogated its own obligations contained in the same deed and contract transactions. In a recent decision, this Court concluded:

> The United States are as much bound by their contracts as are individuals. If they repudiated their obligations it is as much repudiation, with all the wrong and reproach the term implies, as it would be if the repudiator has been a state or municipality or a citizen. *United States v. Winstar,* 116 S.Ct. 2432, 2473, 135 L.Ed.2d 964 (1996).

Furthermore, complete deference to a legislative assessment is not appropriate when the State's self-interest is at stake.[15]

**D. The court of appeals erred in holding that the "time of the taking" occurred in 1967 when the Ordinance was enacted.**

The court of appeals determined that the "time of the taking" was when the Ordinance was enacted. The Ordinance simply did not exist on that date, because it was void when it was adopted.

A Fifth Amendment claim for just compensation claim is not "ripe," and therefore cannot be adjudicated, until a regulation has been specifically applied to the property and has caused specific harm.[16] Furthermore, until a landowner has applied for at least one variance, there is no "final, definitive position regarding how [the government] will apply the regulations at issue to the particular land in question.[17]

By holding that the statute of limitations runs from the passage of an ordinance, the appellate court reaches the extraordinary

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[15] *United States Trust Co. of New York v. New Jersey (1977),* 431 U.S. 1, 25-26, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92, 111-12.

[16] *Agins v. City of Tiburon*, 447 U.S. 255, 160 S.Ct. 2138, 65 L.Ed.2d 106, 111-12 (1980),

[17] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116 (1985).

conclusion that takings claims are ripe for adjudication from that point onward, before any concrete injury results from the application of an ordinance to specific property. Under the rule proposed by the court below, failure to sue immediately upon passage of an ordinance would place the property owner at risk of losing his cause of action to a statute of limitations, The practical result of this rule would be that prudent property owners would always forgo the sometimes lengthy process of negotiating with the local government for a waiver or variance to allow some mutually acceptable use of the land, and instead proceed immediately to court.

Petitioner's Motion for a Partial Summary Judgment alleged that the Ordinance resulted in two "takings" of its property: (1) when the Ordinance was enacted in 1967; and (2) when the request for a variance was denied in 1994. Petitioner reasoned that the circumstances surrounding the enactment of the unconstitutional ordinance were so egregious that the courts would determine that Petitioner's property was taken in 1967. In *Whitney Benefits, Inc. v. United States*,[18] the court found that the government's interference with the plaintiff's reasonable investment-backed expectations, and the character of the governmental actions established that government had taken the plaintiff's property on enactment. However, Petitioner recognizes that this Court's ruling in *Williamson County* requires that when a taking is alleged in a state court proceeding the "time of the taking" cannot occur until Petitioner's request for a variance is denied. Accordingly, to meet the requirements of *Williamson,* Petitioner also alleged throughout this litigation that the denial of the variance request of December 9, 1994, was a second act of inverse condemnation. Petitioner has met all of the requirements of the "ripeness" doctrine; (1) it owned the property; (2) it filed a claim; (3) the claim was denied; (4) it applied for a variance; and (5) the request for a variance hearing was denied. There is no question of limitations. Petitioner's property was taken on December 9, 1994.

**E. The court of appeals erred by not ruling that a regulatory taking had occurred because Ordinance 67-2544 deprived**

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[18] *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169, 1174 (Fed Cir. 1991) *cert denied*, No, 91-195. 112 S.Ct. 406 (1991).

**Petitioner of all viable use of the property and totally destroyed the property's value.**

Ordinance 67-2544 was enacted solely for the benefit of the Respondent. Petitioner's evidence showed that it was an intentional act, stealthily done and designed to appropriate the mineral properties without the payment of any compensation. It was an act of eminent domain, without any cost. When the Respondent purchased the 45.9 acres of surface in 1948 it paid the seller only $897.50. When Respondent enacted the Ordinance in 1967, it unilaterally added to its benefits from the 1948 transaction the prohibition of oil and gas drilling on the entire 985 acre lease. By doing so, it destroyed the value of Petitioner's oil and gas lease. Furthermore, under substantive law, a regulatory taking claim occurs when governmental regulations deprive the owner of all viable use of the property or totally destroys the property's value.[19]

## Conclusion

The decision of the court of appeals will encourage local governments to bypass open proceedings in an effort to avoid paying compensation. If the government foresees a need to take property rights, it can quietly enact a confiscatory regulation, take no further action for ten years, and then announce that the rights are taken and the government is relieved of any obligation to pay compensation. This is a manifestly unfair result and for the sake of sound public policy the Petitioner asks this Court to grant this Writ of Certiorari.

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[19] *Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 Sup. Ct. 2309, 2316, 129 L.Ed.2d 304 (1994); *Lucas v. South Carolina Coastal Commission,* 505 U.S., 1003, 112 S.Ct. 2886, 2894 (1992).

Respectfully submitted

Howard W. Edmunds*
Counsel of Record
9525 Ell Lee Lane, Apt. 316
P. O. Box 631362
Houston, Texas 77263-1362
Telephone: (713) 953-9718

*Attorney for Petitioner*

November 5, 1998

APPENDIX A

**Affirmed and Opinion filed November 20,1997.**

**THE STATE OF TEXAS**

**In The**

FOURTEENTH COURT OF APPEALS

**NO. 14-96-00689-CV**

**TRAIL ENTERPRISES, INC. d/b/a WILSON OIL COMPANY, Appellant**
**V.**
**CITY OF HOUSTON, Appellee**

**On Appeal from the 80th District Court**
**Harris County, Texas**
**Trial Court Cause No. 95-31573**

## OPINION

This appeal is from a summary judgment granted in favor of appellee, the City of Houston (the City), on the ground that limitations barred appellant's claim of inverse condemnation of its mineral rights in property located under Lake Houston. Appellant, Trail Enterprises, Inc. d/b/a Wilson Oil Company, raises ten points of error contending the trial court erred in granting the City's motion for summary judgment and in denying its crossmotion for partial summary judgment. We affirm.

## BACKGROUND

Wilson Oil Company (Wilson) is the lessee under two oil and gas leases covering land out of a 985-acre tract adjacent to and

beneath Lake Houston, which is either within the City limits or within the City's extraterritorial jurisdiction (ETJ). [1] The City acquired the surface estate of 45.9 acres of the 985-acre tract in 1948 for the purpose of constructing Lake Houston. The deed to the City was made subject to the mineral leases to Wilson and others, and reserved the grantor's right to drill and operate wells on the property, so long as the drilling, exploration and production did not endanger, damage or pollute the reservoir.

On March 27, 1954, the City and Wilson entered a contract whereby the City agreed to pay Wilson to elevate twelve wells that would be inundated with the flooding for the lake. In the contract, Wilson agreed that any drilling, exploration or production would not endanger, damage or pollute the reservoir.

On May 19, 1965, the City passed Ordinance 65-912 to control the pollution of Lake Houston. On December 20, 1967, the City passed Ordinance No. 67-2544, currently section 23-102 of the City's Code (the Ordinance), which amended Ordinance No. 65-912. The amendment prohibits the drilling of wells within the "control area" is defined as "[t]hat land contained in the extraterritorial jurisdiction of the city, which contains waters that flow into or adjacent to the watershed of Lake Houston."[2] There is no provision for a hearing to request a variance or exception to the drilling prohibtion.

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[1] Appellant's leasehold estate is part of a 985-acre lease granted by H.C. House to Producers Oil Company on March 1, 1912. On June 5, 1934, Producers' successor assigned a lease covering 885 acres of the tract to the original Wilson Oil Company. Appellant does business under the assumed name of Wilson Oil Company, but the record does not indicate that appellant is affiliated with the former company.

[2] The city's extraterritorial jurisdiction extends five miles outside the city limits.

Forest Cove assigned the leases to appellant, its whollyowned subsidiary, Trail Enterprises, Inc. (Trail), on May 29, 1986. Trail Enterprises operates under the assumed name of Wilson Oil Company.

On December 9, 1994, appellant requested a variance hearing to acquire an exemption from the Ordinance so that it could obtain a permit to drill on its leases. The City did not respond. On June 28, 1995, appellant filed suit against the City requesting a declaratory judgment that the Ordinance is unconstitutional and void. Appellant claimed the Ordinance resulted in a taking of its property rights without just compensation and sought damages for inverse condemnation.

Appellant filed a motion for partial summary judgment, reserving the litigation of its damages for trial. Appellant raised the following grounds: (1) the City deprived it of its property without due process; (2) it was denied equal protection; (3) the City impaired its contract rights; (4) the Ordinance is a retroactive law; and (5) the Ordinance resulted in a taking without compensation. In addition, appellants alleged the City's defenses to its claims were barred by estoppel. The City responded, alleging that: (1) the Ordinance is a constitutionally valid use of its police power; (2) the Ordinance is not arbitrary or capricious; (3) appellant failed to establish a taking occurred; (4) if a taking occurred, it happened on December 20, 1967, and is barred by limitations; and (5) the variance request did not revive the barred causes of action. The City then filed its motion for "final" summary judgment on the ground that all of appellant's claims are barred by limitations because they are related to the purported taking, accrued in 1967, and were barred as a matter of law ten years later, at the latest. The trial court granted the City's motion and, by separate order, denied appellant's motion. This appeal resulted.

## STANDARD OF REVIEW

First, we must resolve a conflict concerning our ability to review the denial of appellant's motion for partial summary judgment. Generally, an order denying a summary judgment is not appealable because it is an interlocutory order. *Novak v. Stevens,* 596 S.W.2d 848, 849 (Tex. 1980). However, an exception exists when both parties move for summary judgment on the entire case, and the court grants one of the motions and overrules the other. *See Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 328 (Tex. 1984); *Tobin v. Garcia,* 159 Tex. 58, 316 S.W.2d 396, 400 (1958). Some courts hold that we may review the denial of a "cross-motion" only when the motion entitles the court to finally resolve the entire case, including rendition of the appropriate judgment. *Jensen Constr. Co. v. Dallas County,* 920 S.W.2d 761, 767-68 (Tex. App.-Dallas 1996, writ denied). Under this reasoning, we may not review the denial of a partial summary judgment which is not otherwise subject to appellate review. *See Rice v. English,* 742 S.W.2d 439, 446 (Tex. App.-Tyler 1987, writ denied) (op. on reh'g) (holding that denial of a motion for partial summary judgment is an interlocutory order not subject to appellate review).

Recently, the Texas Supreme Court held that we "should review all summary judgment grounds the trial court rules on and the movant preserves for appellate review that are necessary for final disposition of the appeal . . . ." Cincinnati *Life Ins. Co. v. Cates,* 927 SW.2d 623, 626 (Tex. 1996). Here, the trial court expressly granted the City's motion for summary judgment and denied appellant's motion for partial summary judgment by separate orders. Appellant raises separate points of error complaining of the denial of its motion. Therefore, because the grounds raised in appellant's motion for partial summary judgment are necessary to the disposition of the appeal, are preserved, and were ruled upon by the trial court, we should address all of these grounds on appeal.

When both parties file motions for summary judgment, we must determine on appeal all questions presented, including the propriety of the order overruling the losing party's motion. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). The court may consider all evidence in deciding whether to grant either motion. *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 766 SW.2d 318, 319 (Tex. App.-Dallas 1989, writ denied). Additionally, the court may rely on one party's evidence to supply missing proof in the other party's motion. *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969).

A summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. Civ. P. 166a(c). To prevail, a defendant must establish as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of each of the plaintiff s causes of action. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). A summary judgment for the defendant disposing of the entire case is proper only if, as a matter of law, the plaintiff could not succeed upon any theories pleaded. *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983). Summary judgment is also proper for a defendant if it conclusively establishes all elements of its affirmative defense as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

## STATUTE OF LIMITATIONS

In appellant's first point of error, it complains generally that the trial court erred in granting the City's motion for summary judgment. In points two and three, it argues its claims are not barred by the two-year or ten-year statutes of limitations.

Appellant has alleged a claim for taking without just compensation. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V.

The provision is applicable to the states under the due process clause of the Fourteenth Amendment. The Texas Constitution also contains a "takings clause," which provides in part that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such persons. TEX. CONST. art 1, § 17.

If the government appropriates property without paying adequate compensation, the owner may recover the resulting damages in an "inverse condemnation" suit. *See, e.g., City of Austin v. Teague,* 570 S.W.2d 3 89 (Tex. 1978); *City of Abilene v. Burk Royalty Co.,* 470 S.W.2d 643 (Tex.1971). An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development. *Taub v. City of Deer Park,* 882 S.W.2d 824, 826 (Tex. 1994), *cert. denied,* 513 U.S. 1112 (1995); *Westgate, Ltd. v. State,* 843 S.W.2d 448, 452 (Tex. 1992). Governmental restrictions on the use of property can be so burdensome that they result in a compensable taking. *San Antonio River Auth. v. Garrett Bros.,* 528 S.W.2d 266, 273 (Tex. Civ. App.-San Antonio 1975, writ ref d n.r.e.).

All property, however, is held subject to the valid exercise of the police power, and a municipality is not required to compensate a landowner for losses resulting therefrom. *See City of College Station v. Turtle Rock Corp.,* 680 SW.2d 802, 804 (Tex. 1984); *Woodson Lumber Co. v. City of College Station,* 752 S.W.2d 744, 746 (Tex. App.-Houston [I st Dist.] 1988, no writ). A city may enact reasonable regulations to promote the health, safety, and general welfare of its people. *Turtle Rock Corp.,* 680 S.W.2d at 805.

The United States Supreme Court has stated, "government regulation - by definition involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the

use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 5 1, 100 S.Ct. 318, 326 (1979). As Justice Holmes stated in the landmark decision of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 159 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power." When a government regulates a right, prohibits some noxious use, or if the public need outweighs the private loss, compensation should not be allowed. *Teague*, 570 S.W.2d at 393.

There is no statutory provision specifically providing a limitations period for inverse condemnation actions. The courts in Texas agree, however, that a plaintiff s cause of action for inverse condemnation is barred after the expiration of the ten-year period of limitations to acquire land by adverse possession, which is found in TEX. Civ. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986).[3] *See Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 110 (Tex. 1961) (holding that ten-year limitations period applied while rejecting claim that two-year limitations barred action for taking that occurred when operation of dam and formation of lake caused flooding of sewage disposal plant); *Waddy v. City*

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[3] Section 16.026 provides in relevant part:

A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses or enjoys the property.
TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(a) (Vernon 1986).

"Adverse possession" means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.
TEX. CIV. PRAC. & REM. CODE ANN. § 16.02 1 (1) (Vernon 1986).

*ofHouston,* 834 S.W.2d 97, 102 (Tex. App.-Houston [I 't Dist.] 1992, writ denied) (affirming summary judgment where city established that sewer pipe's installation seventy years before suit was filed was significantly more than ten-year limitations period for inverse condemnation); *Hudson v. Arkansas Louisiana Gas Co.,* 626 S.W.2d 561, 563 (Tex. App.-Texarkana 1981, writ ref'd n.r.e.) (reversing a summary judgment where the trial court failed to apply ten-year limitations period to inverse condemnation claim); *Hubler v. City of Corpus Christi,* 564 S.W.2d 816, 823 (Tex. Civ. App.-Corpus Christi 1978, writ ref d n.r.e.) (distinguishing ten-year limitations period for "taking" from two-year period for "damaging" of property). The two-year limitations period for actions for trespass or damage to land is not applicable here. *See* TEX. Civ. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1976 & Supp.1997).

While the City does not agree that a taking has occurred, it asserts that if the Ordinance does constitute a regulatory taking, appellant's claim accrued in 1967 when the Ordinance was passed. Consequently, the City asserts appellant's claim is barred by the ten year limitations period found in TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986).

Appellant contends there are several reasons why its claims are not barred. First, it argues that its request for a variance in 1994 somehow revived its claim. It contends that by ignoring appellant's request for a variance, the City performed a second act of taking. We find no support for this position. For cases of adverse possession, a cause of action accrues and limitations begins to run when entry on land is made. *Waddy,* 834 S.W.2d at 103. When, as here, there has been no "entry" on land, but rather an interference with the right to use the property, limitations must begin when that interference first occurs. A cause of action accrues for limitations purposes when facts come into existence authorizing a claimant to seek a judicial remedy. *Murray v. San Jacinto Agency, Inc.,* 800 S.W.2d 826, 828 (Tex. 1990). Any "taking" in this case occurred when the Ordinance prohibiting drilling was

enacted, not when appellant was later denied a hearing on its request for a variance.

Appellant contends that the Texas Supreme Court's language in *Brazos River Authority* supports its argument that no limitations period applies. Appellant focuses on the Court's statement that "[i]n case of a 'taking' of property, the city's right thereto would not be barred if *ever* until the expiration of the ten year period necessary to acquire lands by adverse possession . . . ." 354 S.W.2d at 110 (emphasis added). Appellant argues that the Supreme Court used the term "if ever" to indicate a claim for "taking" is never barred. We determine, however, that the *Brazos* Court's inclusion of "if ever" referred to its previous discussion recognizing that former article 5517 provided that statutes of limitations did not apply to cities.[4] *See* id. at 109. The Court also stated that "the great weight of American authority supports the position that, absent a particular statute covering the situation, the land limitation rather than the general limitation statutes apply to such inverse condemnation proceedings." Id.. Appellant also argues the Court cited *Ackerman v. Port of Seattle* for the proposition that "an action for constitutional taking is not barred by any statute of limitations. ..." 55 Wash.2d 400, 405, 348 P.2d 664, 667 (1960). The *Ackerman* court actually stated that while an action for constitutional taking is not barred by limitations, it "may be brought at any time before title to the property taken is acquired by prescription. The prescriptive period in this state has been held to be ten years." Id. Thus, while the terminology may be different, the *Ackerman* case clearly found that a claim for "taking" or inverse condemnation must be brought within ten years. Consequently, both *Brazos* and *Ackerman* support the applicability of the ten-year limitations period to this case.

Nor do we accept appellant's argument that the City cannot

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[4] Under current law, a city's right of action is also not barred by section 16.026, among other limitations statutes. *See* TEX. Civ..PRAC. & REM. CODE ANN. § 16.06 l(a) (Vernon 1997).

prevail on its limitations claim because it failed to prove the elements of adverse possession. We do not read the cases applying the ten-year limitations period to inverse condemnation claims as requiring the defendant to establish the elements of adverse possession. Therefore, the City is not required to prove it made an "actual and visible appropriation of the land." In *Waddy*, the City was required to establish only the date the cause of action accrued, not the elements of adverse possession, to be entitled to summary judgment on limitations on plaintiffs inverse condemnation suit. 834 S.W.2d at 103. Moreover, the City's possession in *Waddy* was not "visible" because the plaintiff claimed he was unaware of the sewer pipe crossing his property when he bought it. Id. at 100. Appellant makes a contradictory argument that the City cannot prove the elements of adverse possession because no taking has occurred and the cause of action has not yet accrued. The City correctly responds that appellant cannot have it both ways: it cannot sue for a taking and deny that the cause of action has accrued. Because proof of the elements of adverse possession are not required when asserting the ten-year limitations period for an inverse condemnation suit, we conclude that the ten-year period applies to a regulatory taking, as well as when there has been an actual physical invasion or appropriation of property.

To prove its limitations defense, the City was required to establish when the cause of action accrued. *Waddy*, 834 SW.2d at 103. The City asserted that any taking occurred when the Ordinance prohibiting drilling was passed. Appellant pleaded "Ordinance 67-2544 violated the Fifth Amendment to the United States Constitution [and Article 1, section 17 of the Texas Constitution] because it was a taking of Plaintiff s property for public use without the payment of just compensation and without Plaintiff s consent. It was an act of inverse condemnation." Appellant's pleadings admit that the Ordinance was passed on December 20, 1967. Appellant also pleaded that the Ordinance did not permit exceptions. Because it provided no procedure for a variance or appeal, the Ordinance was final when implemented and any ftirther action was futile. *See Town of*

*Sunnyvale v. Mayhew*, 905 S.W.2d 234, 246 (Tex. App.-Dallas 1994, writ granted).

A party may plead itself out of court by pleading facts that affirmatively negate its cause of action. *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974). A summary judgment may not be based upon a weakness in the nonmovant's pleading or proof unless it establishes the absence of a right of action or an insurmountable bar to recovery. *State v. Durham*, 860 S.W.2d 63, 68 (Tex. 1993). Where the plaintiff s pleadings establish that the statute of limitations has run, pleadings alone can justify summary judgment. *Washington v. City of Houston*, 874 S.W.2d 791, 794 (Tex. App.-Texarkana 1994, no writ). Appellant did not plead or prove that it did not discover its cause of action until a later date; thus the City had no burden to negate the discovery rule. Therefore, the City established its limitations defense as a matter of law.

## ESTOPPEL

In point of error four, appellant argues that the City is estopped from asserting its affirmative defense of limitations. Appellant argues that the City cannot disavow its obligations contained both in its contract with Wilson and in the reservation of mineral rights contained in the City's deed. It claims that these agreements are covenants running with the land. Appellant contends the City is estopped from "testifying or offering evidence in derogation of Wilson Oil's title because of the common law doctrines of estoppel by deed, by contract, and by record; the sanctity of mineral reservations in a deed; the sanctity of covenants that run with the land." [5]

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[5] The City is not, as appellant argues, attempting to negate appellant's title to the mineral interests by virtue of its leases and the reservation in the City's deed. Appellant still possesses its leasehold interest in the minerals, but its ability to produce them has been restricted. If appellant had defeated the City's claim of a valid use of its police powers and established that the Ordinance constituted a

If in response to a motion for summary judgment on limitations, a nonmovant asserts an affirmative defense such as estoppel, it has the burden of raising a fact issue with respect to its affirmative defense. *Zale Corporation v. Rosenbaum*, 520 SW.2d 889, 891 (Tex. 1975); *Nichols v. Smith*, 507 SW.2d 518, 521 (Tex. 1974). It must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment. *Brownlee v. Brownlee*, 665 SW.2d 111, 112 (Tex. 1984); *"Moore " Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972).

These same claims are raised in appellant's point of error complaining of the denial of its motion for partial summary judgment. In point of error eight, appellant contends the Ordinance impaired its contractual rights in violation of both the federal and Texas constitutions. As the movant for summary judgment, appellant was required to establish his contract claim as a matter of law. *See* TEX. R. Civ. P. 166a(c).

As a general rule the doctrine of estoppel does not apply against a governmental unit exercising governmental functions. *Bowman v. Lumberton I.S.D.*, 801 S.W.2d 883, 888 (Tex. 1990); *Dallas Cent. Appraisal Dist. v. G.T.E. Directories Corp.*, 905 S.W.2d 318, 322 (Tex. App.-Dallas 1995, writ denied); *Farmer's Marine Copper Works, Inc. v. City of Galveston*, 757 SW.2d 148, 152 (Tex. App.-Houston [1st Dist. 1988, no writ). Appellant concedes that the Texas Constitution permits laws impairing contracts when the public safety and welfare must be protected. The provision in the Texas constitution prohibiting laws which impair the obligations in contracts is not absolute and must be balanced against a state's interest in exercising its police power. *Texas State Teachers Ass'n v. State*, 711 SW.2d 421, 424-25 (Tex.

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taking, i.e., that it could not obtain access to the minerals through directional drilling or any other means, then it would have been entitled to compensation had it brought its claim within the limitations period.

App.-Austin 1986, writ ref d n.r.e.). As more fully discussed herein, the City's prohibition on drilling is a valid exercise of its police power.

In addition, the City has not acted in derogation of its contract with Wilson or the mineral reservation in its deed. Both permitted drilling only if there was no pollution of the Lake. The record indicates that the Ordinance was passed after a "great number of complaints" about drilling in the control area of Lake Houston. In October 1967, the Director of the Department of Public Works wrote the mayor that "[t]he wells that have been drilled have caused a degree of pollution to the Lake waters by the drilling of oil wells, thereby allowing pollutants to seep or flow into ditches, reservoirs, and gullies that ultimately drain or wash into the lake." We determine that appellant's estoppel and contract claims do not preclude the City from asserting its limitations defense as a matter of law.

In conclusion, appellant's cause of action for inverse condemnation is barred by limitations and the City is entitled to summary judgment as a matter of law. We overrule appellant's points of error one through four and eight.

## CONSTITUTIONAL ARGUMENTS

In point of error five, appellant asserts generally that the trial court erred in denying its motion for partial summary judgment. In points six and ten, appellant contends the City, through its Ordinance, deprived it of its property without due process in violation of article 1, section 19 of the Texas Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.

Appellant first argues it was deprived of procedural due process because it was denied notice and an opportunity for hearing before loss of its property interest. It complains that the Ordinance was passed on an "emergency" basis after its first reading. In

addition, it contends the city council's agenda was not specific and did not constitute sufficient notice to alert property or mineral owners that a drilling prohibition would be considered. [6]

Appellant did not own the mineral interests when the Ordinance was passed in 1967. Therefore, the facts surrounding the passage of the Ordinance are immaterial. When Forest Cove, the parent company of Trail, which does business as Wilson and is domiciled in Houston, acquired the leases in 1972, it was charged with notice of the Ordinance. *See City* of *Dallas v. Coffin*, 254 S.W.2d 203, 206-07 (Tex. Civ. App.-Austin 1953, writ ref'd n.r.e.). One is charged with constructive notice of the actual knowledge that could have been acquired by examining public records. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981). Those residing in or having business dealings with a city are presumed to know its ordinances. *Board of Adjustment of the City of San Antonio v. Nelson*, 577 S.W.2d 783, 786 (Tex. App.-San Antonio), *affd*, 584 S.W.2d 701 (Tex. 1979). We hold appellant was charged with constructive notice of the Ordinance and its procedural due process challenge must fail as a matter of law.

Appellant also contends it was deprived of substantive due process because the Ordinance mandated a complete ban on drilling. In addition, appellant raises an equal protection challenge in its point of error seven. Appellant contends the Ordinance requires a small group of mineral interest owners with interests in the control area, which is in the City's ETJ, to pay the cost of protecting the City's water supply. Appellant argues: "mineral owners within the city limits are free to drill within 1000 feet of the lake and its drains (including man-made), streams, or tributaries regardless of the proximity of the wells to Lake Houston." The City responds that the Ordinance applies equally to all mineral interest owners whose interests are within the City's

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[6] The Agenda simply stated: "Amend Sec. I of Ord. No. 65-912 passed May 19, 1965, regulating controlling & prohibiting pollution of Lake Houston."

ETJ in the Lake Houston control area. In addition, the summary judgment record does not contain evidence of other drilling in the area of Lake Houston[7]

The standard of review for a substantive due process challenge is whether the statute has a reasonable relation to a proper legislative purpose, and whether it is arbitrary or discriminatory. *Cannon v. Lemon,* 843 S.W.2d 178, 183 (Tex. App.-Houston [ 14 t' Dist.] 1992, writ denied). Similarly, to pass equal protection scrutiny under a rational basis review, an ordinance's classification must be rationally related to a legitimate state interest. *City of Austin v.* Quick, 930 SW.2d 678, 692 (Tex. App.-Austin 1996, writ granted).

When a city government passes an ordinance that is final and conclusive, it cannot be revised by the courts unless the passing of the ordinance was arbitrary, unreasonable, and a clear abuse of power. *Safe Water Foundation of Texas v. City of Houston,* 661 S.W.2d 190, 192 (Tex. App.-Houston [I[st] Dist.] 1983, writ ref'd n.r.e.). There is a presumption in favor of the validity of the ordinance and appellant faces an "extraordinary burden" when asserting an ordinance is unconstitutional. *Turtle Rock Corp.,* 680 S.W.2d at 805.

The City asserts that this regulation is a legitimate exercise of its police power. It contends it is reasonable to prohibit drilling in the area of its watershed to protect the City's water supply. The right of an entity to conduct oil and gas activities in this state is not an absolute right, but a qualified right subject to reasonable restriction by the state. *See Elliff v. Texon Drilling Co.,* 146 Tex. 575, 210 S.W.2d 55 8, 561 (Tex. 1948); *see also R. D. Oil Co. v. Railroad Comm'n of Texas,* 849 S.W.2d 871, 875 (Tex. App.-Austin 1993, no writ) (holding that commission order directing that

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[7] The location of wells shown on an unauthenticated Railroad Commission gas production ledger cannot be determined.

wells be plugged after a finding of potential pollution did not constitute a taking without due process). Reasonable regulations to promote the health, safety, and the general welfare of its people is a valid exercise of a city's police power. *Turtle Rock Corp.*, 680 S.W.2d at 805. We hold that the Ordinance is a valid exercise of the City's police power as a matter of law.

Because the Ordinance is reasonably related to a legitimate state interest, protection of the City's water supply, it does not violate appellant's constitutional rights. This is true even though the Ordinance may have a greater effect on appellant as a member of a group of oil and gas lease holders with interests in the control area than it may have on other mineral owners. In *Helton v. City of Burkburnett,* a factually similar case, the Fort Worth Court of Appeals rejected an equal protection challenge to an ordinance regulating drilling and stated:

> The equal protection clause of the Fourteenth Amendment does not prohibit a municipality with properly delegated powers from enacting ordinances based on reasonable classification of the objects of the legislation or of the persons whom it affects. Ordinances will not be regarded as special and class legislative merely because they affect one class and not another, provided they affect all members of the same class alike; if a classification in municipal ordinances is reasonable, including all that may be said to be similarly situated and affecting alike all of those, there is no forbidden discrimination. Thus, specific municipal regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other businesses of a different kind ....

619 S.W. 2d 23, 24-25 (Tex.App.—Fort Worth 1981, writ ref'd n.r.e.).

The summary judgment evidence shows that the purpose of the Ordinance was to protect the City's main source of water supply from contimination caused by drilling of oil and gas wells within the prohibited control area. Measures to prevent contamination of Lake Houston caused by drilling for oil and gas in the area of its watershed are rationally related to the legitimate goal of protecting the City's water supply from pollution. Thus, there is a rational relationship between the purpose of the statute and its means, and appellant's substantive due process and equal protection rights have not been violated.

In point nine, appellant contends the Ordinance is a retroactive law in violation of the Texas Constitution. *See* Tex.Const. art I, § 16. The constitution's prohibition against retroactive laws must be balanced against the state's interest in exercising its police power. *Texas State Teachers Assn.*, 711 S.W.2d at 424-25. For the reasons previously discussed, any retroactive effect of the Ordinance is outweighed by the City's imperative need to protect its water supply from pollution. We overrule points of error five, six, seven, nine and ten.

## CONCLUSION

In conclusion, we affirm both the order granting the City's motion for summary judgment and the order denying appellant's motion for partial summary judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 20, 1997.

Panel consists of Justices Yates, Hudson, and Fowler.

Publish — TEX. R. APP. P. 47.3(b).

APPENDIX B

NOVEMBER 20, 1997

**THE STATE OF TEXAS**

**JUDGMENT**

**THE FOURTEENTH COURT OF APPEALS**

TRAIL ENTERPRISES, INC. d/b/a WILSON OIL COMPANY,

Appellant NO. 14-96-00689-CV

V.

CITY OF HOUSTON, Appellee

This cause, an appeal from the summary judgment in favor of Appellee, the City of Houston, signed April 1, 1996, and from the order denying appellant's motion for partial summary judgment dated April 3, 1996, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED.**

We order appellant, Trail Enterprises, Inc. d/b/a Wilson Oil Company, and its sureties, Bruce M. Partain and Howard W. Edmunds, jointly and severally, to pay all costs incurred in this appeal. We order this decision certified below for observance.

APPENDIX C

NO. 95-31573

TRAIL ENTERPRISES, INC. D/B/A WILSON OIL CO. IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

V.

CITY OF HOUSTON 80TH JUDICIAL DISTRICT

**ORDER GRANTING CITYOF HOUSTON'S MOTION FOR SUMMARY JUDGMENT**

BE IT REMEMBERED that on the 1st day of April, 1996, came on to be considered Defendant, City of Houston's (hereinafter the "City") Counter-Motion for Summary Judgment. Plaintiff, Trail Enterprises, Inc., d/b/a Wilson Oil Company appeared by and through its attorneys of record. After considering the City's Motion for Summary Judgment and arguments and authorities set forth therein, the Court finds that the City's Counter Motion for Summary Judgment should be in all respects granted. It is therefore, ORDERED that the City of Houston's Motion for Summary Judgment on all issues in this cause as against Wilson Oil is hereby granted.

SIGNED this 1 day of April, 1996.

/S/_____

JUDGE PRESIDING

APPROVED AS TO CONTENT:

GENE L. LOCKE
City Attorney

By:_____
Judy K. Hatfield
Assistant City Attorney
State Bar No.: 09224300
900 Bagby, 4th Floor
P. O. Box 1562
Houston, Texas 77251
(713) 247-2060
(713) 247-1017 (Fax)

Attorneys for Defendant
CITY OF HOUSTON, TEXAS

Appendix D

NO. 95-31573

| | |
|---|---|
| TRAIL ENTERPRISES, INC. D/B/A WILSON OIL CO. | IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS |
| VS. | |
| CITY OF HOUSTON | 80TH JUDICIAL DISTRICT |

**ORDER DENYING TRAIL ENTERPRISES, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

BE IT REMEMBERED that on the lst day of April, 1996, came on to be heard Plaintiff, Trail Enterprises, Inc., d/b/a Wilson Oil Company's ("Wilson") Motion for Partial Summary Judgment. The Court, after considering the evidence and arguments of counsel, is of the opinion that said motion should be DENIED.

It is therfore ORDERED and ADJUDGED that Plaintiff's Motion for Partial Summary be DENIED.

SIGNED this 3 day of April, 1996.

/s/_____
JUDGE PRESIDING

APPROVED AS TO CONTENT:

GEN L. LOCKE
City Attorney

By:_____

Judy K. Hatfield
Assistant City Attorney
State Bar No.: 09224300
900 Bagby, 4th Floor
P.O. Box 1562
Houston, Texas 77251
(713) 247-2060
(713) 247-1017 (Fax

Attorneys for Defendent
CITY OF HOUSTON, TEXAS

Appendix E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

July 3, 1998

Wells, Peyton, Greenberg & Hunt
P.O. Box 3708
Beaumont, TX 77704

Ms.Andrea Chan
Assistant City Attorney
P.O. Box 1562
Houston, TX 77251

RE: Case Number 98-0001
Court of Appeals Number: 14-96-00689
Trial Court Number: 95-31573

Style: TRAIL ENTERPRISES, INC., d/b/a WILSON OIL COMPANY
V.
CITY OF HOUSTON

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,
John T. Adams, Clerk

by: /s/_____
Michael H. Kopp, Deputy

cc: The Honorable Olen Underwood
Ms. Mary Jane Smart, Clerk
Mr. Charles Bacarisse

Appendix F

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 03, 1998

Mr. J. Mitchell Smith
Wells Peyton Greenberg & Hunt
P.O. Box 3708
Beaumont, TX 77704-3708

Ms. Andrea Chan
Assistant City Attorney
P. 0. Box 1562
Houston, TX 77251

RE: Case Number 98-0001
Court of Appeals Number: 14-96-00689-CV
Trial Court Number: 95-31573

Style: TRAIL ENTERPRISES, INC. d/b/a WILSON OIL COMPANY
v.
CITY OF HOUSTON

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by_____
Michael H. Kopp, Deputy

cc: Ms. Gloria Diana Rodriguez, District Clerk
The Honorable Olen Underwood
Ms. Mary Jane Gay, Clerk
Mr. Charles Bacarisse

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEC 8, 1995 Michael N. Milby, Clerk

TRAIL ENTERPRISES, INC.,
D/B/A WILSON OIL COMPANY
Plaintiff

vs. CIVIL ACTION NO. H-95-3958

CITY OF HOUSTON
Defendant

ORDER OF REMAND

For the reasons set forth in the separate Memorandum and Order signed this day, it is hereby ORDERED that this case is remanded to the 80th Judicial District Court of Harris County, Texas.

The Clerk will mail a certified copy of this Order of Remand to the Clerk of the 80th Judicial District Court of Harris County, Texas as required by 28 U.S.C. § 1447, and shall notify all parties and provide them with a true copy of this order.

SIGNED at Houston, Texas, this 6th day December, 1995.

s/s
EWING WERLEIN, JR.
UNITED STATE DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEC 8, 1995 Michael N. Milby, Clerk

TRAIL ENTERPRISES, INC.,
D/B/A WILSON OIL COMPANY

Plaintiff

vs. CIVIL ACTION NO. H-95-3958

CITY OF HOUSTON

Defendant

MEMORANDUM AND ORDER

Pending is Plaintiff Trail Enterprises, Inc. d/b/a Wilson Oil CompanyIs Motion to Remand (Document No. 5), to which City of Houston ("City of Houston") has filed its response in opposition.

Plaintiff filed this suit in the 80th Judicial Court of Harris County, Texas. Plaintiff alleges that it is the oil and gas lessee of certain acreage in the vicinity of Lake Houston, that the City of Houston has enacted a city ordinance prohibiting the drilling of oil and gas wells within a control area that encompasses Plaintiff's leased acreage, and that the City has failed to respond to Plaintiff's request for a variance to permit it to drill a certain well(s) within the control area.

Plaintiff alleges two causes of action, first, for declaratory judgment that the subject city ordinance is void for a number of assigned reasons, including an allegation that it is in violation of

Article I, § 10, Clause 1 of the United States Constitution; and second, for inverse condemnation of its property, for which it seeks an award of actual damages. The claim for inverse condemnation is founded not only upon Article 1, S 17 of the Texas Constitution, but also upon a claimed taking without just compensation in violation of the Fifth Amendment to the United States Constitution as incorporated with respect to the states by the Fourteenth Amendment of the United States Constitution.

In its Motion to Remand, Plaintiff concedes that its federal constitutional takings claims are not ripe, first, because there has not been a final and authoritative determination of the type and intensity of development legally permitted on the subject property and, second, because Plaintiff has not availed itself to the state procedures and been denied just compensation. The Court agrees. A takings claim under the United States Constitution is not ripe until the claimant has unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining such compensation. Williams County Regional Planning Commin v. Hamilton Bank, 105 S. Ct. 3108, 3120 (1985). Moreover, there is no showing that Texas's procedures for recovery of damages for a taking for public use are not adequate or that those procedures violate the United States Constitution. Indeed, Plaintiff acknowledged the adequacy of state procedures by filing its suit in state court to recover just compensation for what it claims has been a taking of its property.

In its response, the City of Houston simply relies upon Plaintiff's allegations for recovery under the Fifth and Fourteenth Amendments of the United States Constitution, and Plaintiff's other invocations of federal constitutional provisions, and therefore claims it is entitled to remove the case pursuant to 28 U.S.C. S 1441(a). This is not sufficient. If the claim under the Fifth and Fourteenth Amendments that Plaintiff Is property has been taken for a public use without just compensation is unripe, then the district court has no jurisdiction to consider that claim. Williams County, 105 S. Ct. at 3120; see also Samaad v. City of Dallas,

940 F.2d 925 (5th Cir. 1991). Because the federal constitutional claims of an uncompensated taking for the public use are unripe, this Court has no federal question jurisdiction over the federal takings claims.

The principles enunciated in this Memorandum have more often arisen in actions filed by plaintiffs alleging a Fifth Amendment takings claim in federal court before having unsuccessfully exhausted one's state's remedies. In those instances the case is subject to dismissal for lack of subject matter jurisdiction under the ripeness doctrine. See, e.g., Jama Construction v. City of Los Angeles, 938 F.2d 1045 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1293 (1992); Southern-Pacific Transp. Co. v. City of Los Angeles. 922 F.2d 498, 508 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1991). A plaintiff who is required first to proceed in state court, but desires later to bring his Fifth Amendment takings claim in federal court, must then be concerned whether to allege the Fifth Amendment takings claim in state court or, if not alleged, nonetheless run the risk that adjudication of the state takings claim will bar a later federal takings claim under res judicata principles and state preclusion law. This complex area of takings law is still developing. *See, e.g..*, *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (district court should first determine whether issue preclusion bars Fifth Amendment takings claim expressly reserved by plaintiff in prior state court action under the state takings clause) ; Palomar Mobilhome Park Ass'n v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993) (federal takings claim barred by res judicata based on state court judgment even though plaintiff failed explicitly to plead federal constitutional violations in state court complaint) ; Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992) (plaintiffs who failed to reserve their federal constitutional claims in Florida state court were later barred from litigating those claims under principles of res judicata). In the case at bar, however, Plaintiff is willing and desirous to litigate both state and federal claims in state court. Regardless, remand to the state court is required in view of this Court's lack of subject matter

jurisdiction on ripeness grounds. Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994), *cert. denied,* 115 S. ct. 1693 (1995). [8]

The other claim alleged by Plaintiff is for a declaratory judgment that the challenged city ordinance is void. The Federal Declaratory Judgment Act ("Act") provides in part:

"In a case of actual controversy within its jurisdiction, . . .any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." U.S.C. S 2201 (emphasis added) . As is evident from the word "may," the Act does not grant litigants an absolute right to a legal determination. The grounds alleged for a declaratory judgment are primarily based upon state law, and involve issues of whether the city ordinance has been adopted in accordance with state law or in violation of the Texas Constitution. There is also an allegation that

---

[8] As an alernative to remanding the entire case, Plaintiff in the case at bar suggests the possibility of a partial remand, retaining the federal claims and remanding the state law claims to state court. In opposition, the City argues that to(continued) bifurcate the state and federal claims "would be burdensome, requiring both parties to try legal issues that are inexorably intertwined." Defendant City of Houston's Response to Plaintiff's Motion to Remand, 3. Bifurcation of the issues isthe course followed by the district court in *Standard Materials, Inc. v. City of Slidell,* 1994, WL 285043 (E.D. La. 1994). In *Standard Materials* the court severed from the removed state court case the Fifth Amendment takings claim, remanded to state court the remainder of the case, and then dismissed without prejudice the federal takings claim. In doing so, the court expessed the view that if the federal takings claim is not ripe for the federal district court to decide, "neither is it ripe for the state court to decide." *Id.* at 8. Although there is an appealing logic in that view, it leaves unresolved, and the court did not address, the res judicata and issue preclusion issues above discussed. In other words, whether "ripe" for the state litigation of the state takings claims in state court. Certainly in this case, where Plaintiff has moved in the first instance to remand the entire case, and where Defendant City of Houston opposes a bifurcation of issues, the state and federal claims should not be divided.

the ordinance impairs the contractual rights of Plaintiff in violation of Article I, § 10, Clause 1 of the United States Constitution, but this does not appear to be the focal point of Plaintiff's arguments that the city ordinance is invalid. Because the Fifth Amendment takings claim is not ripe for adjudication in federal court, there will be a state court suit involving the same parties and fundamentally the same controversy that is the subject of the declaratory judgment claim. Given that fact, along with the observation that state law and state constitutional issues are predominantly involved in Plaintiff's challenge to the city ordinance, it may arguably be an abuse of discretion if this Court were to retain the declaratory judgment claim. *Magnolia Marine Transport Co. , Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1581 (5th Cir. 1992). In any event, this Court declines to accept jurisdiction over the declaratory judgment claim. 28 U.S.C. S 2201.

Defendant's remaining argument, that Plaintiff's Motion to Remand is not properly before the Court is without merit, and is DENIED. Plaintiff's request for recovery of costs and attorney's fees incurred as a result of Defendant's removal of the case is DENIED.

Because this Court lacks subject matter jurisdiction over the Fifth and Fourteenth Amendment claims because they are unripe, and because the Court declines to accept jurisdiction over the declaratory judgment claim challenging the validity of a city ordinance primarily under state statutory and constitutional law, Plaintiff's Motion to Remand is GRANTED. It is therefore

ORDERED that this case is REMANDED to the 80th Judicial District Court of Harris County, Texas.

The Clerk will mail a certified copy of this Order of Remand to the Clerk of the 80th Judicial District Court of Harris County, Texas, as required by 28 U.S.C. S 1447, and shall notify all parties and provide them with a true copy of this order.

SIGNED at Houston, Texas, this 6th day of December, 1995.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

Appendix H

THE SUPREME COURT OF TEXAS

Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

January 2, 1998

Mr. J. Mitchell Smith
Wells Peyton Greenberg & Hunt
P.O. Box 3708
Beaumont, TX 77704

Ms. Andrea Chan
Assistant City Attorney
P. 0. Box 1562
Houston, TX 77251-1562

RE: Case Number 98-0001

Style: TRAIL ENTERPRISES, INC. d/b/a WILSON OIL COMPANY v. CITY OF HOUSTON

Dear Counsel:

Motion for extension of time to file petition for review, under Rule 53.7(f), Tex. R. App. P., was this day granted.

The petition for review is due to be filed in the Supreme Court of Texas on or before 4 February, 1998.

Sincerely,

John T. Adams, Clerk
By: /s/ _____
Courtand Crocker, Deputy

cc: Ms. Mary Jane Smart, Clerk

APPENDIX I

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NO. 98-0001

---

IN THE
SUPREME COURT OF TEXAS

---

TRAIL ENTERPRISES, INC. D/B/A
WILSON OIL COMPANY,

Petitioner,

VS.

CITY OF HOUSTON,
Respondent.

---

On Appeal from the Fourteenth Court of Appeals, No. 14-96-00689-CV; Trial Court Cause No. 95-31573, 80th Judicial District Court, Harris County, Texas

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# PETITION FOR REVIEW

---

## IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 53.2(a), Texas Rules of Appellate Procedure, Petitioner hereby identifies the parties and their attorneys in this lawsuit:

1. Trail Enterprises, Inc. d/b/a Wilson Oil Company, Plaintiff/Appellant/Petitioner;

2. J. Mitchell Smith and Bruce M. Partain of Wells, Peyton, Greenberg & Hunt, L.L.P., P. O. Box 3708, Beaumont, Texas 77704; Telephone: (409)838-2644; Fax: (409)838-4713; and Howard W. Edmunds, P. O. Box 631362, Houston, Texas 77263-1362; Telephone:(713)953-9718,Attorneys for Plaintiff/Appellant/Petitioner;

3. City of Houston, Defendant/Appellee/Respondent; and

4. Gene L. Locke, City Attorney, and Assistant City Attorneys, Judy K. Hatfield and Andrea Y. Chan, City of Houston Legal Department, P. O. Box 1562, Houston, Texas 77251; Telephone: (713)247-2060; Fax: (713)247-1017, Attorneys for Defendant/Appellee/Respondent.

Respectfully submitted,

WELLS, PEYTON, GREENBERG,
& HUNT, L.L.P.

BY:_____

J. Mitchell Smith
Texas State Bar No. 18626900
Bruce M. Partain
Texas State Bar No. 15548400
P.O. Box 3708
Beaumont, Texas 77704
(409) 838-2644
Fax: (409) 838-4713
Howard W. Edmunds
Texas State Bar No. 06432000
P.O. Box 631362
Houston, Texas 77263-1362
(713) 953-9718.

ATTORNEYS FOR PETITIONER,
TRAIL ENTERPRISES, INC. D/B/A
WILSON OIL COMPANY

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3. Judgment of The Fourteenth Court of Appeals

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## STATEMENT OF THE CASE

1. This is an inverse condemnation case concerning a City of Houston ordinance and oil and gas leases owned by Wilson Oil Company. The case also concerns the constitutionality of said ordinance as applied to Wilson Oil Company.

2. The Honorable Scott Link is the judge who signed the orders from which Wilson Oil Company appeals.

3. The trial court is the 80th Judicial District Court of Harris County, Texas.

4. The trial court disposed of the case by signing an Order Granting City of Houston's Motion for Summary Judgment and an Order Denying Trail Enterprises, Inc. d/b/a Wilson Oil Company's Motion for Partial Summary Judgment.

5. The parties in the court of appeals are the City of Houston and Trail Enterprises, Inc. d/b/a Wilson Oil Company.

6. The district of the court of appeals is the Fourteenth Supreme Judicial District of Texas at Houston, Texas.

7. The justices participating in the decision in the court of appeals are Justices Yates, Hudson and Fowler. Justice Leslie Brock Yates is the author of the opinion for the court.



8. The opinion of the court of appeals has not been released for publication.

9. The court of appeals affirmed both the order granting the City's motion for summary judgment and the order denying Wilson Oil's motion for partial summary judgment.

## ix. STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal under section 22.001(a)(3) and (6) of the Texas Government Code.

x.

## ISSUES PRESENTED

### ISSUE NO. 1

Wilson Oil's inverse condemnation claims are not barred by the ten year statute of limitations. (§16.026, Tex. Civ. Prac. & Rem. Code). This regulatory taking of property rights can never satisfy the elements required of the City in order for it to prevail on its limitations defense.

### ISSUE NO. 2

The City ordinance prohibiting Wilson Oil from drilling oil and gas wells on land contained within Houston's extraterritorial jurisdiction nearer than one thousand feet of Lake Houston, its drains, streams and tributaries, is unconstitutional as applied to Wilson Oil. The City Ordinance impermissibly deprives Wilson Oil of its presently vested property rights without due process and denies Wilson Oil equal protection under the law. (U.S. CONST. amend. V and Amend. XIV; TEX. CONST. art. I, §§ 3, 19 and 29).

### ISSUE NO. 3

The City ordinance prohibiting Wilson Oil from drilling oil and gas wells on land contained within Houston's extraterritorial jurisdiction nearer than one thousand feet of Lake Houston, its drains, streams and tributaries, is
xi.unconstitutional as applied to Wilson Oil. The City Ordinance impermissibly impairs the contractual rights of Wilson Oil to drill for oil and gas, contractual rights previously negotiated, validated

and accepted by the City of Houston prior to passage of the Ordinance. (U.S. CONST. art. I, §10; TEX. CONST. art. I, §§ 16 and 29).

xi.

ISSUE NO. 4

The City ordinance prohibiting Wilson Oil from drilling oil and gas wells on land contained within Houston's extraterritorial jurisdiction nearer than one thousand feet of Lake Houston, its drains, streams and tributaries, is unconstitutional as applied to Wilson Oil. The City ordinance retroactively takes away and impairs the rights acquired under existing laws and contracts for Wilson Oil to drill for oil and gas, and the Ordinance impermissibly creates new obligations in respect to the contracts previously executed by the City of Houston. (TEX. CONST. art. I, §§ 16 and 29).

ISSUE NO. 5

The City ordinance prohibiting Wilson Oil from drilling oil and gas wells on land contained within Houston's extraterritorial jurisdiction nearer than one thousand feet of Lake Houston, its drains, streams and tributaries, is unconstitutional as applied to Wilson Oil. The City has taken, damaged and

destroyed for public use Wilson Oil's right to drill for oil and gas, rights previously agreed to and acknowledged by the City, without Wilson Oil's consent, without due process and without just compensation. (U.S. CONST. amend. V; TEX. CONST. art. I, §§ 17 and 29).

ISSUE NO. 6

The City of Houston cannot arbitrarily interfere with Wilson Oil's acknowledged, bargained for, accepted and recorded rights to drill for oil and gas within the extraterritorial jurisdiction of the City nearer than one thousand feet of Lake Houston. The City's action is constitutionally impermissible because it unreasonably interferes with Wilson Oil's right to lawfully use and enjoy its property, and to realize all economically beneficial, viable and productive uses of its property.

ISSUE NO. 7

A defense of limitations cannot bar Wilson Oil's constitutional challenge to a City ordinance.

ISSUE NO. 8

The City of Houston is estopped from denying the terms and conditions of the legal instruments it signed in 1948 and 1954 that acknowledge, validate and accept Wilson Oil's presently vested, continuous rights to drill for oil and gas within the watershed of Lake Houston, regardless of limitations.

## STATEMENT OF FACTS

The Opinion of the court of appeals correctly states the nature and facts of the case. The following additions should provide the Court with a more thorough understanding of the factual background.

The 1948 deed to the City was made subject to the mineral leases to Wilson Oil and others, and reserved the grantor's right to drill and operate wells on the property, so long as the drilling, exploration and production did not endanger, damage or pollute the reservoir' or source of water supply; and such drilling, exploration and production would be conducted in accordance with the rules and regulations of the Railroad Commission of Texas. (App. No. 18, p. 3).

In the 1954 contract between the City and Wilson Oil, Wilson Oil agreed that any drilling, exploration or production accomplished in connection with said lease would not endanger, damage or pollute the reservoir. (App. No. 19, p. 4). The parties further agreed, "the terms, provisions and covenants hereof shall extend to, be binding upon, and enure to the benefit of the parties hereto, their respective assigns and successors in interest, and it is agreed that the terms and provisions of this agreement shall constitute covenants running with the land and leasehold estate in the above described premises." (App. No. 19, p. 4). The contract was authorized by the City of Houston Ordinance No. 57, April 28, 1954, was recorded by the City in the Deed Records of Harris County, Texas, and a map thereof was recorded in the Map Records of Harris County, Texas. (Tr. 106-114; 127-135).

## SUMMARY OF ARGUMENT

The case concerns the regulatory taking by the City of Houston ("the City") of Wilson Oil Company ("Wilson Oil")'s presently vested rights to drill for oil and gas on lands near Lake

Houston that happen to lie within Houston's extraterritorial jurisdiction. Houston's extraterritorial jurisdiction extends five miles outside its city limits. The taking occurred by the passage of Ordinance 67-2544 ("the Ordinance") in 1967 which prohibits the drilling of oil and gas wells within the control area (land contained in the extraterritorial jurisdiction of the City containing waters that flow into Lake Houston) nearer than 1,000 feet from Lake Houston or its tributaries.

The dispute between Wilson Oil and the City arises because the Ordinance effectively negates the reservations, conditions, covenants and terms of a duly recorded deed the City previously accepted as grantee, contracts executed by the City containing covenants running with the land, and city ordinances and motions adopting said instruments. These documents, negotiated and accepted by the City, give to Wilson Oil presently vested rights in the leasehold estate, rights that include the right to drill for oil and gas. These documents have not been repudiated or rescinded and, Wilson Oil argues, the City is estopped to deny or negate the rights conveyed thereunder. The Ordinance at issue retroactively cancels these rights because the City now prohibits Wilson Oil from exercising same.

Wilson Oil argues the City's action is a compensable taking; a taking of unreasonable and arbitrary means. Oil and gas drilling is presently occurring within the watershed of Lake Houston at a prolific pace. The City defends its actions only by arguing Wilson Oil's claims are barred by the ten year statute of limitations. Wilson Oil argues the limitations statute is not applicable in this regulatory taking case because adverse possession does not occur. If limitations is applicable, the City cannot satisfy the elements required to prove its defense. The City has yet to take or possess anything belonging to Wilson Oil. It is simply regulating Wilson Oil by preventing it from exercising its legal rights.

Additionally, the Ordinance is unconstitutional as applied to Wilson Oil. It was passed without notice and without giving affected owners the right to be heard. The city ordinance retroactively destroys presently vested rights of Wilson Oil and impairs valid, recorded contracts; contracts that address the very thing the Ordinance attempts to control - pollution. Houston's actions take, destroy and damage Wilson Oil's property for public use without its consent and without just compensation. In short, the Ordinance is an unreasonable interference with Wilson Oil's right to use and enjoy its property in a legal matter. These constitutional issues were not addressed by the City, were ignored by the trial court, and barely acknowledged by the court of appeals. The City's actions warrant review by this Honorable Court.

## ARGUMENT

The Supreme Court should exercise jurisdiction to hear the case because it clearly involves the construction and validity of a statute and is engulfed in a myriad of constitutional issues. Additionally, the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected.

### UNLAWFUL TAKING

The court of appeals incorrectly concluded the Ordinance is a proper exercise of the City's police power. In order for the Ordinance to be a valid exercise of the City's police power, not constituting a taking, there are two related requirements. First, the regulation must be adopted to accomplish a legitimate goal; it must be "substantially related" to the health, safety, or general welfare of the people. Second, the regulation must be reasonable; it cannot be arbitrary. *City of College Station v. Turtle Rock Corporation*, 680 S.W.2d 802, 805 (Tex. 1984). Whether a police power

regulation constitutes a compensable taking is a question of law and not of fact. *Id.* at 804.

Although the Ordinance may be designed to protect Lake Houston from pollution, it is not reasonable and it is clearly arbitrary. The Texas Legislature has given the power to regulate the operation of oil and gas wells in this state to the Texas Railroad Commission. Tex. Nat. Res. Code ANN. §§ 91.101, *et. seq.* (Vernon 1993). The Commission, the state agency responsible for safety and environmental regulation of the oil and gas industry, does not limit drilling according to the proximity to fresh water, whether potable or not. (Tr. 235-236). Further, evidence was presented that significant oil and gas drilling is occurring within the Houston city limits and within close proximity to the watershed of Lake Houston, but outside the City's extraterritorial jurisdiction. (Brief for *Amicus Curiae*, Texas Independent Producers and Royalty Owners Association, pp. 2-3). The Ordinance fails to accomplish a legitimate goal. The drilling and exploration for oil and gas continues within close proximity to Lake Houston, but outside the Ordinance's grasp. The City's objective to protect the water supply from exposure to pollution caused by oil and gas activities clearly fails, and the Ordinance is arbitrary in its application. The City's regulation constitutes a compensable taking as a matter of law.

## LIMITATIONS

This Court has held an inverse condemnation may occur when the government physically appropriates or invades property, or when it unreasonably interferes with a landowner's right to use and enjoy property, such as by restricting access or denying a permit for development. *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448, 452 (Tex. 1992), *See also City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978). Thus, there are two types of governmental "takings," one being a **physical** taking and the other a **regulatory** taking. In the case of a physical taking, the defendant may be able to plead a limitations defense such as

§16.026, Tex. Civ. P. & Rem. Code, because the defendant complies with the adverse possession and other detailed requirements of that statute. In the case of this regulatory taking, however, it is impossible for the City to meet the requirements of §16.026.

The court of appeals relied upon the opinions in *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex. App. - Houston [1st Dist.] 1992, writ denied), and *Hudson v. Arkansas Louisiana Gas Company*, 626 S.W.2d 561, 563 (Tex. App. -Texarkana 1981, writ ref'd n.r.e.), for the proposition § 16.026 is applicable to the present case. However, these are cases in which there was an actual physical taking of the property by the governmental unit. The present case is distinguishable because the City has not practiced a physical taking of Wilson Oil's property. The City's regulatory action does not trigger the statute of limitations because Wilson Oil's right to drill is continuous and ongoing as long as its leases remain in effect. Wilson Oil owns presently vested rights to drill and explore for oil and gas, rights which were acknowledged by the City in the 1948 and 1954 transactions.

The City does not offer any evidence to demonstrate Wilson Oil, in 1994, had lost any of its rights held under the deeds, reservations, contracts, and covenants running with the land created in prior agreements, executed and recorded. The written agreements executed by the City in the 1948 and 1954 transactions were essential parts of the consideration executed by Wilson Oil and its predecessors in title. The very subject matter of these agreements, an essential part of the *quid pro quo*, was governmental regulation; unless the government is bound by its agreements to not interfere with oil and gas drilling, the City's agreements are meaningless.*See United States v. Winstar Corporation*, 116 S.Ct. 2432, 2477; 135 L.Ed.2d 964 (1996).

The covenants contained in the recorded agreements between Wilson Oil and the City are covenants that run with the land and constitute muniments of title of the conditions,

reservations, and agreements contained therein. The obligation of the City to perform its obligations in full under these written instruments is continuous and will never expire. Thus, Wilson Oil is not barred by limitations from asserting its rights under the agreements and prosecuting its claims against the City.

Assuming that § 16.026 is an applicable limitation provision, the City must satisfy all elements of the requisite statute. The court of appeals incorrectly determined the City is not required to prove it made an "actual and visible appropriation of the land," or otherwise satisfy the requisite elements of § 16.026.

Section 16.026 reads: "A person must bring suit not later than ten years after the day the cause of action accrues to recover real property **held in peaceable and adverse possession** by another who cultivates, uses, or enjoys the property." (Emphasis added). Under Texas law, one may only acquire adverse possession of severed mineral interests by actually producing the minerals and extracting them from the ground. *Stephenson v. United States*, 33 Fed. Cl. 63, 71 (1994), *citing*, *Thomas v. Henderson*, 795 S.W.2d 847, 851 (Tex. App. - Beaumont 1990, writ denied). The City clearly did not meet the requirements of § 16.026. The City did not make a physical invasion of Wilson Oil's property and could not hold its property "in peaceable and adverse possession." The City has never taken possession of Wilson Oil's mineral interest by extracting the minerals from the ground. There is no evidence the City actually and visibly appropriated Wilson Oil's oil and gas leases. The City cannot satisfy the requisites of § 16.026 and its limitations defense thereby fails as a matter of law. The court of appeals incorrectly held the City established its limitations defense as a matter of law.

## CONSTITUTIONAL ISSUES

Wilson Oil's first cause of action requested the trial court, pursuant to Texas Civil Practice and Remedies Code § 37.004, to declare the Ordinance unconstitutional and void as applied to

Wilson Oil because it violated art. I, §§ 3, 16, 17 and 19 of the Constitution of Texas, and the Fifth and Fourteenth Amendments and art. I, § 10, clause 1 of the United States Constitution. The declaratory cause of action was not answered or discussed by the City and it was not considered or adjudicated by the court of appeals. Wilson Oil meets the requirements of the declaratory judgment statute as it is "a person interested under a ... written contract, or whose rights, status, or other legal relations are affected by a ... municipal ordinance." Tex. Civ. Prac. & Rem. Code ANN. § 37.004 (Vernon 1997).

As Wilson Oil makes an "as applied" challenge to the Ordinance, rather than a "facial" challenge, the appellate court should have made a separate investigation of the effects and documentary evidence brought forth by Wilson Oil in deciding whether the trial court reached a correct conclusion. *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 623 (Tex. 1996). An examination of the facts and documents in support of same establishes the Ordinance is unconstitutional and void as applied to Wilson Oil and the appellate court should have reversed and rendered judgment for Wilson Oil and remanded the case to the trial court for a trial on the damages.

**Art. I, § 16 Impairment of Contract.** Wilson Oil furnished summary judgment evidence of deeds, contracts, motions and ordinances wherein the City, for adequate consideration, agreed Wilson Oil would be allowed to drill for oil and gas on its leases. In the 1948 deed, the grantor reserved all of the minerals from the conveyance and the City, by its acceptance of the deed and in ancillary contracts it executed therewith, agreed all drilling, exploration and production on the surface of the land would be conducted in accordance with the rules of the Texas Railroad Commission. (App. No. 18, p. 3). In the 1954 contract, the City agreed Wilson Oil would be performing additional drilling and Wilson Oil agreed that such drilling would not cause pollution on the leases. (App. No. 19, p. 4).

The rights and duties contained in a government contract are governed generally by the law applicable to contracts between private individuals. *Winstar*, 116 S.Ct. at 2473; *Fristoe v. Blum*, 92 Tex. 76, 45 S.W. 998, 999 (1898); *Accord Guadalupe - Blanco River Authority v. City of San Antonio*, 145 Tex. 611, 200 S.W.2d 989 (1947) (a municipality has no power to cancel and repudiate a valid contract arbitrarily). Nor may a municipality rescind a valid contract without the consent of the other party to the agreement. *Johnson v. Smith*, 112 Tex. 222, 246 S.W. 1013, 1015 (1922). Any impairment of the obligation of a contract is within the prohibition of the Constitution, the degree of impairment being immaterial. *Dallas County Levee Improvement District No. 6 v. Rugel*, 36 S.W.2d 188, 189 (Tex. Comm'n App. 1931, judgm't adopted). The court of appeals committed reversible error in allowing the City to unilaterally and arbitrarily cancel and repudiate its own contract.

**Art. I, § 16 Prohibition Against Retroactive Application of a Law.** An ordinance is constitutionally impermissibly retroactive when it takes away or impairs vested rights, creates new, heavy obligations or imposes novel, expensive duties with respect to past transactions and affects actions that accrued or vested at a prior time. *Baytown Construction Company Inc. v. City of Port Arthur*, 792 S.W.2d 554, 560 (Tex. App. - Beaumont 1990, no writ). The Ordinance destroys the vested rights of Wilson Oil because it prohibits drilling on its entire lease. The Ordinance retroactively impairs and destroys previous contracts in a deed agreed to by the City and bargained for in good faith by the signatories thereto. Therefore, the Ordinance is constitutionally invalid as a matter of law.

**Art. I, § 19 Procedural Due Process.** The minimum federal and state constitutional requirements dictate a party deprived of a property right must have an opportunity for hearing granted at a meaningful time and in a meaningful manner, appropriate to the nature of the case, as well as notice of the hearing. *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813

(Tex. 1983); *Shawgo v. Spradlin*, 701 F.2d 470, 480 (Fifth Cir. 1983), *cert. denied*, 104 S.Ct. 404; 78 L.Ed.2d 345 (1983). The City violated the most minimal procedural due process requirements. Barely ten months after the City was required to give written notice to property owners affected by the City's actions in *City of Houston v. Fore*, 401 S.W.2d 921 (Tex. Civ. App. -Waco 1996), *affirmed*, 412 S.W.2d 35 (Tex. 1967), the City adopted the Ordinance without giving any notice to the affected property owners. The agenda for the city council meeting gave no notice of the proposed ordinance to the affected parties, and the minutes of said meeting establish the Ordinance was adopted without any procedural due process requirement. (Tr. 160-163; 165-182).

**Art. I, § 19 Substantive Due Process.** The arbitrary and confiscatory adoption of the Ordinance violated the substantive due process rights of Wilson Oil because it mandated a complete ban on drilling, a most essential right for an oil and gas producer. The statute in question does not reasonably relate to a proper legislative purpose, and it is arbitrary and discriminatory. *Cannon v. Lemon*, 843 S.W.2d 178, 183 (Tex. App. - Houston [14th Dist.] 1992, writ denied).

In the process of enacting the Ordinance, the City denied Wilson Oil every element of procedural and substantive due process. Any legislative enactment that does not provide procedural and substantive due process is void.

## ESTOPPEL

The City is estopped from denying the terms and conditions of the many legal instruments it signed in 1948 and 1954. The City is estopped by the doctrines of estoppel by deed, contract and record. These doctrines apply as an estoppel against a governmental unit regardless of whether it is exercising a governmental or proprietary function. The terms "deed" and "contract" are used interchangeably under the authorities relating

to estoppel. *Wilson v. Alexander*, 50 S.W.2d 440, 441 (Tex. Civ. App. - Fort Worth 1932), *rev'd on other grds.*, 77 S.W.2d 873 (Tex. 1935).

## CONCLUSION AND PRAYER

The fundamental issue is whether a municipality may unilaterally disavow by an ordinance the reservations, conditions, covenants, considerations, and terms of (1) a valid deed which it accepted as grantee and under which it still claims title; (2) valid contracts executed by the municipality that contain covenants running with the land and leasehold estate; and (3) its own validly adopted ordinance and motion approving said transactions. This issue remains unresolved. If the City's limitation defense is valid, there will be nothing to prevent a city from quietly passing a law to revoke obligations it has made and to then plead limitations after the passage of time. Purchasers of mineral reservations will not be able to rely on reservations and deeds from the grantors. Purchasers of real property interests will be unable to rely upon covenants running with the land. Mortgage and title companies will be unable to rely on the finality of recorded documents. Individuals and companies who contract with the City of Houston will be unable to rely on the City to honor its contracts or to have their contracts honored by a court of law.

Wilson Oil has shown by overwhelming evidence the City adopted the Ordinance with the intention of knowingly taking Wilson's property for public use, without its consent, and without the payment of adequate consideration in the process of achieving its unconstitutional "taking" of Wilson Oil's constitutional rights.

The Supreme Court should grant Wilson Oil's Petition for Review as this case involves the construction and validity of a statute, involves constitutional issues, and because the court of appeals committed an error of law of such importance to the State's jurisprudence that it should be corrected. After review, Wilson Oil respectfully requests this Honorable Court reverse the

judgment of the court of appeals and render judgment granting Wilson Oil's Motion for Partial Summary Judgment. Wilson Oil further requests this Honorable Court remand the case to the trial court for trial on the issues of damages.

Respectfully submitted,

WELLS, PEYTON, GREENBERG,
& HUNT, L.L.P.

BY:_____

J. Mitchell Smith
Texas State Bar No. 18626900
Bruce M. Partain
Texas State Bar No. 15548400
P.O. Box 3708
Beaumont, Texas 77704
(409) 838-2644
Fax: (409) 838-4713

Howard W. Edmunds
Texas State Bar No. 06432000
P.O. Box 631362
Houston, Texas 77263-1362
(713) 953-9718.

ATTORNEYS FOR PETITIONER,
TRAIL ENTERPRISES, INC. D/B/A
WILSON OIL COMPANY

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of PETITIONER'S PETITION FOR REVIEW has been provided to counsel for Respondent, City of Houston, as follows:

**Gene L. Locke**
City Attorney
**Judy K. Hatfield**
Assistant City Attorney
**Andrea Y. Chan**
Assistant City Attorney City of Houston Legal Department
P. O. Box 1562
Houston, Texas 77251
BY CERTIFIED MAIL, RRR

DATED this 3rd day of February, 1998.

/s/ _____
J. Mitchell Smith

APPENDIX J

THE SUPREME COURT OF TEXAS

Post Office Box 12248
Austin, Texas 78711

(512) 463-1312
July 22, 1998

Mr. J. Mitchell Smith
Wells Peyton Greenberg & Hunt
P.O. Box 3708
Beaumont, TX 77704-3708

Ms. Andrea Chan
Assistant City Attorney
P. 0. Box 1562
Houston, TX 77251-1562

RE: Case Number 98-0001
Court of Appeals Number: 14-96-00689-CV
Trial Court Number: 95-31573

Style: TRAIL ENTERPRISES, INC. d/b/a WILSON OIL COMPANY v. CITY OF HOUSTON

Dear Counsel:

Today, the Supreme Court of Texas granted Petitioner's unopposed motion for an extension of time to file motion for rehearing in the above referenced case until August 4, 1998.

Sincerely,

John T. Adams, Clerk

By:_____
Courtand Crocker
Deputy

cc: The Honorable Olen Underwood
Ms. Mary Jane Gay, Clerk
Mr. Charles Bacarisse

# APPENDIX K

## TRAIL ENTERPRISES, INC., DBA WILSON OIL COMPANY'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Trail Enterprises, Inc., d/b/a Wilson Oil Company, Petitioner in Cause No. 98-0001, files this motion for rehearing.

## POINTS RELIED ON FOR REHEARING

1.This Court erred in denying Wilson Oil's Petition For Review because the Court of Appeals erred in overruling appellant's points of error one, five, eight and nine. Wilson Oil's summary judgment evidence clearly established the City impaired Wilson Oil's contractual rights in violation Article I, § 16, of the Bill of Rights of the Texas Constitution and of Article I, Section 10, Clause 1 of the United States Constitution. Furthermore, said evidence showed the City acted retroactively to destroy Wilson Oil's contractual rights, also in violation of Article I, § 16 of the Texas Constitution. Finally, the same evidence showed the City had unilaterally abrogated its own contractual obligations to Wilson Oil in violation of the above constitutional provisions.

Art 1, § 29 of the Bill of Rights of the Texas Constitution requires that a statutory act that violates any section of the Bill of Rights is void. In *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89-90 (Tex. 1997), the Court said: " Further, the provisions in section 29 excepting everything in the Bill of Rights 'out of the general powers of government' and providing that 'all laws' contrary to the Bill of Rights shall be void demonstrates that the Bill of Rights serves as a shield against the powers and laws of government." *See, Travelers Ins. Co. v. Marshall*, 124 Tex. 45, 76 S.W.2d

1007, 1009-10 (Tex. 1934); *City of Beaumont v. Boulllion*, 896 S.W.2d 143, 149 (Tex. 1995).

In the court's only discussion of Wilson's contract impairment and revocation claims the court said: " . . . appellant contends the Ordinance impaired its contractual rights in violation of both federal and Texas constitutions. As the movant for summary judgment, appellant was required to establish his contract claim as a matter of law." (P. 11) The "Background" section of the court's opinion, however, shows that Wilson had, indeed, met that requirement. The court described (1) the 1948 deed, wherein the City purchased 45.9 acre of surface and the grantor reserved all of the minerals and the right of Wilson Oil to drill on the property; (2) the 1954 contract between the City and Wilson, wherein Wilson released the City from liability for the partial flooding of its leasehold and agreed that its future drilling would not endanger, damage or pollute the reservoir; and (3) the enactment by the City of Ordinance 67-2544 which prohibited drilling of wells within the "control area" of Lake Houston nearer than 1,000 feet from Lake Houston or any of its drains, streams or tributaries. The "control area" was defined as "[t]hat land contained in the extraterritorial jurisdiction of the City, which contains waters that flow into or adjacent to the watershed of Lake Houston." There was no exception to request a variance or exception to the drilling prohibition.

Thus, the opinion of the court of appeals was by itself proof that Wilson had established its contract claims as a matter of law. In addition to that, however, Wilson had filed thirty-one exhibits as part of its motion for a partial summary judgment, of which exhibits 1-12. inclusive, conclusively established Wilson's contract claims as a matter of law.

The appellate opinion also established that the City had impaired Wilson's contractual right to drill on its leases and that the Ordinance had acted retroactively to impair those rights. "Any impairment of the obligation of a contract—the degree of

impairment is immaterial—is within the prohibition of the Constitution." *Longever v. Miller*, 76 S.W.2d 1025, 1031, (Tex. 1934). By the enactment of the Ordinance, the City not only impaired Wilson's rights under the deed and contract, rights which the City itself had granted, but it also abrogated its own obligations contained in the same deed and contract transactions. Thus, the City unilaterally, by fiat, seized the property of Wilson. Article I, § 29 of the Texas Constitution requires that such a constitutional violation be declared void. In *United States v. Winstar*, 116 S. Ct. At 2473, 135 L.Ed.2d at 1014 (1996) (Breyer, J. concurring), it was held:

"The United States are as much bound by their contracts as are individuals. If they repudiated their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator has been a state or municipality or a citizen."

The court of appeals concluded, "appellant's cause of action is barred by limitations and the City is entitled to summary judgment as a matter of law." The court, however, imposed the statute of limitations without ever having determined the constitutionality of the Ordinance. The constitutionality of an ordinance is determined when it is adopted:

"Generally, a statute that has been declared unconstitutional is void from its inception and cannot provide a basis for any right or relief. It is thus the general rule that an unconstitutional statute, even though having the form and name of law, in reality is no law and in legal contemplation is as inoperative as if it had never undergone the formalities of enactment. Such a statute leaves the question that it purports to settle just as it was prior to its ineffectual enactment. It is invalid and imposes no duties, confers no rights, creates no office, bestows no power, affords no protection, and justifies no acts performed under it." Vol. 12A Tex.Jur.3d, Constitutional Law, § 46, p. 359.

The Ordinance was invalid when it was adopted. It was error for the court to consider that limitations applied to a void ordinance. What the court has decreed is; if a municipality enacts an unconstitutional and void ordinance that said ordinance will automatically become valid when the time for repose has expired. To follow that theory to its logical conclusion would mean that the statute of limitations has replaced the Constitution as the paramount law in Texas.

2.This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling appellants point of error number 7, that the City had denied to Wilson Oil equal protection of the law in violation of article I, § 3 of the Bill of Rights of the Texas Constitution and in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. "An as-applied equal protection claim requires that the government treat the claimant different from other similarly situated landowners without any reasonable basis." *Mayhew v. The Town of Sunnyvale*, 964 S.W.2d 922, 939 (Tex. 1998). Ordinance 67-2544 is part of Chapter 23, Article IV. Water Supply Protection, of the City Code of Ordinances. Section 23-101 (1) defines the *Control area*, as, "That land contained in the *extraterritorial jurisdiction* of the city, which contains waters that flow into or adjacent to the watershed of Lake Houston." (Emphasis added). Section 23-102, which is Ordinance 67-2544, as codified, reads: "No well shall be drilled within the control area of Lake Houston which is nearer than one thousand (1,000) feet from the normal water's edge of Lake Houston or any of its drains, streams or tributaries. . . ." Because Wilson was located within the extraterritorial jurisdiction, the Ordinance, by its very definition, denied equal protection to Wilson Oil. The Ordinance prevented Wilson Oil from drilling while allowing its neighboring oil operators who were located within the city limits and were similarly situated to Lake Houston, free to drill. The city code (Exhibit 18, Plaintiff's Motion for a Partial Summary Judgment) is, on its face, evidence the City violated Wilson Oil's equal protection rights.

3.This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling appellant's points of error numbers one through four, and eight. The court concluded that a statement by a city official in a letter to the Mayor, that oil and gas drillers were causing a "degree of pollution" to Lake Houston, allowed the City to assert its limitations defense as a matter of law, as opposed to Wilson Oil's estoppel and contract claims. (Exh.15, Pl's. Mot. For Part. S.J.) The court of appeals held:

"In addition, the City has not acted in derogation of its contract with Wilson or the mineral reservation in its deed. Both permitted drilling only if there was no pollution of the Lake. The record indicates that the Ordinance was passed after a great 'number of complaints' about drilling in the control area of Lake Houston. In October 1967, the Director of the Department of Public Works wrote the mayor that '[t]he wells that have been drilled have caused a degree of pollution of the Lake waters by the drilling of oil wells, thereby allowing pollutants to seep or flow into ditches, reservoirs, and gullies that ultimately drain or wash into the lake.' We determine that appellant's estoppel and contract claims do not preclude the City from asserting its limitations defense as a matter of law." pp 11-12, of opinion.

"In conclusion, appellant's cause of action for inverse condemnation is barred by limitations and the City is entitled to summary judgment as a matter of law. We overrule appellant's points of error one through four and eight."

In the "Background" section of the appellate opinion the court found that the deed to the City was made subject to the mineral leases to Wilson and the right to drill on its leases was reserved "so long as the drilling, exploration and production did not endanger, damage or pollute the reservoir." Similarly, the "Background" section also said that the 1954 contract between the City and Wilson provided that "Wilson agreed that any drilling, exploration or production would not endanger, damage or pollute

the reservoir." The appellate court did not say, but those documents also required, that the drilling "shall be conducted in accordance with the rules and regulations of the Railroad Commission of the State of Texas . . ." Without that provision Wilson Oil would have been in the unenviable position of having the City possess the executive, legislative, and judicial power to determine when and if it could drill. The court of appeals clearly acknowledged Wilson Oil's deed and contract rights, but concluded that the City had not acted in derogation of Wilson's contract rights because of the allegation in the letter that drilling "had caused a degree of pollution of the Lake waters . . ." It will be noted that both the deed and contract required that Wilson was responsible only for its own drilling, not for the drilling of all oil and gas operators anywhere near Lake Houston. The court concluded, however, that the allegation of "pollution" was sufficient evidence to entitle the City to a summary judgment as a matter of law. The City presented no evidence of pollution by Wilson Oil.

In *Florida Rock Industries, Inc. V. United States,* 8 Cl. Ct. 160, 171 (1985), affirmed in part, 791 F.2d 893 (Fed. Cir. 1986), the court said:

"It is conceivable that government could prohibit all viable economic uses of property without paying compensation if all such uses, in fact, cause pollution. However, simple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the fifth amendment. . . . Government may not circumvent the takings clause by defining an activity as pollution and rendering it noxious by fiat. Pollution, as that term is normally understood, involves serious adverse physical effects upon the health, welfare or property of others. To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes such harm."

"Even the State may not denounce that as a nuisance which is not in fact." *Stockwell v. State,* 221 S.W. 932, 934, 110 Tex. 550 (Tex. 1920). Furthermore, the government bears the burden of

proving such a nuisance defense. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 154-58 (1990).

4.This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling appellants point of error number 4, that the City was estopped by the doctrines of estoppel by deed, by contract and by record from asserting the affirmative defense of limitations. The basis for the decision of the court of appeals was that the letter from the head of the public works department using the word "pollution." was sufficient evidence to rule that the City was not so estopped. Appellant hereby incorporates the argument relating to the negative effect of the "pollution" letter, under Section 3, above, to this section concerning the subject of estoppel.

In *Williams v. Hardie (Corzine's Heirs)*, 85 Tex. 499, 22 S.W. 399, 401, (1893), the Court held:

" . . Few rules of law are better established or of greater antiquity than that a man may bind himself irrevocably by putting his seal to a grant or covenant, and will not be allowed to disprove or contradict any declaration or averment contained in the instrument, and essential to its purpose. A recital or allegation in a deed or bond which is certain in its terms, and relevant to the matter in hand, will therefore be conclusive between the parties in any controversy growing out of the instrument itself, or the transaction in which it was executed. *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. (8th Amer. Ed.) note, p. 819, and cases cited."

It was error for the appeals court to find that an unsubstantiated allegation of pollution in a letter by the defendant can overturn common law principles of English and American law that have endured for centuries.

5.This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling appellant's point

number 10 that Ordinance 67-2544 violated art. I, § 17 of the Bill of Rights of the Texas Constitution and of the Fifth Amendment to the United States Constitution, because the Ordinance was an act of inverse condemnation.

Wilson Oil does not have a bundle of property rights. It has only one property right, the right to drill for oil and gas. When that right is prohibited it is only a matter of time before production ceases, and the property is worthless. That would be true of any oil field owned by any oil operator, even a major oil company. Under substantive law, a regulatory taking claim occurs when governmental regulations deprive the owner of all economically viable use of the property or totally destroys the property's value. *Mayhew, Id.* at 936; *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994); Where such a taking is absolute, no inquiry into the state's interest advanced in support of the regulation is required. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015-19, 112 S. Ct., at 2893-94. .

Ordinance 67-2544 does not allow Wilson Oil any use of its property that would make the property sufficiently desirable for it to be sold. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422, 1433 (9th Cir. 1996), *Cert. granted,* 118 S. Ct. 1359, (March 30, 1998, No. 97-1235); *Park Ave. Tower Assoc. v. City of New York,* 746 F.2d 135, 139 (2d. Cir.1984) *cert. denied,* 470 U.S. 1087 (1985).

Furthermore, Article I, § 17 of the Texas Constitution also prohibits the City from "damaging" Wilson Oil's property. An ordinance that prevents drilling by and oil and gas company inflicts severe damage. Ordinance 67-2544 was a violation of Wilson Oil's constitutional rights under Article I, § 17 of the Bill of Rights of the Texas Constitution. As such, Article I, § 29 of the Bill of Rights of the Texas Constitution mandates that the Ordinance be declared void and of no further force and effect as applied to Wilson Oil Company.

6.This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling appellant's point of error number 6, that the City had deprived Wilson Oil of its property without due process of law in violation of article I, § 19 of the Bill of Rights of the Texas Constitution and in violation of the due process clauses, Fifth and Fourteenth Amendments to the United States Constitution.

The court of appeals held (p. 12) that "[a]ppellant did not own the mineral interest when the Ordinance was passed in 1967. Therefore, the facts surrounding the passage of the Ordinance are immaterial." The United States Supreme Court held in *Monongahela Navigation Company v. United States,* 148 U.S. 312, 326 (1893):

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, "Nor shall private property be taken for public use without just compensation. . . .And this just compensation, it will be noticed, is for the **property and not the owner. Every other clause in this Fifth Amendment is personal."** (Emphasis added).

Thus, the denial of due process was to the "property" and stayed with the property and all subsequent owners. This is the only logical way to deal with property ownership. The facts surrounding the passage of the Ordinance (Exhibits 14, 15, 16, and 17, pl's mot. for part. S.J.) show the City did not comply with even one element of the constitutional requirements of due process.. The facts surrounding the passage of the Ordinance are very material.

In addition, the City of Houston does not possess zoning powers. Therefore, Wilson Oil's property was not afforded any due process protections, such as notice, hearings, the right to present evidence, and the many other protections required by state enabling statutes. *Mayhew, Id.* at 939-40.

The circumstances of the enactment of the Ordinance, wherein the City unilaterally abrogated its own valid obligations, clearly demonstrate that the "character" of the City's enactment and enforcement of the Ordinance was arbitrary, unreasonable and violated fundamental principles of fairness. It was a violation of Wilson Oil's substantive due process rights. The facts detailed in Plaintiff's Motion for a Partial Summary Judgment clearly show the City intentionally appropriated Wilson Oil's property

7.This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling appellants point of error number 3, that none of Wilson Oil's claims are barred by Tex. Civ. P. & R. Code § 16.026. By making this ruling the court of appeals violated article II, § 1 of the Texas Constitution, which reads:

Section 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances expressly permitted.

On page 6 of its opinion the court of appeals held:

"[t]here is no statutory provision specifically providing a limitations period for inverse condemnation actions. The courts in Texas agree, however, that a plaintiff's cause of action for inverse condemnation is barred after the expiration of the ten-year period of limitations to acquire land by adverse possession, which is found in Tex. Civ. Prac. & Rem. Code Ann. (§ 16.026) (Vernon 1986)." (pp 6-7).

Thus, when the court of appeals found that the Legislature had not provided a statutory provision for a limitations period in inverse

condemnation cases, that court supplied a law by ruling that § 16.026 applied to acts of inverse condemnation. It was a violation of article II, § 1, for the court to supply legislative requirements where none had been enacted by the Legislature.

To make matters worse, the court of appeals then held:

"Nor do we accept Appellant's argument that the City cannot prevail on its limitations claim because it failed to prove the elements of adverse possession. We do not read the cases applying the ten-year limitations period to inverse condemnation claims as requiring the defendant to establish elements of adverse possession. Therefore, the City is not required to prove it made an 'actual and visible appropriation of the land." (p. 9).

With that conclusion, the court of appeals had not only supplied the necessary statute, but also eliminated the adverse possession requirements of the existing § 16.026. The adverse possession requirements have been part of the ten-year statute since the days of The Republic of Texas. In *W.T. Carter & Bro. v. Holmes,* 113 S.W.2d 1225, 1226, 131 Tex 365(Com of App., 1938) the court said:

" * * * in order to maintain the defense under the ten years' statute of limitations, the defendant must prove 'actual, exclusive, continuous, visible, and notorious possession, distinct and hostile, for the full period of ten years.' 2 Tex.Jur. P. 12."

The court of appeals does not possess the constitutional authority to enact legislation, nor to eliminate important statutory requirements from existing legislation. "The judicial branch is bound, just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without compensation." *Bell v. Town of Wells,* 557 A2d 168, 176, Me. (1989).

8..This Court erred in denying Wilson Oil's Petition for Review because the court of appeals erred in overruling Wilson Oil's second claim of inverse condemnation, the City's denial (by not responding) to Wilson Oil's request, of December 9, 1994, asking for a variance hearing to allow Wilson Oil to drill on its leases. The appellate court held: "Appellant contends there are several reasons why its claims are not barred. First, it argues that its request for a variance in 1994 somehow revived its claim. It contends that by ignoring appellant's request for a variance, the City performed a second act of taking. We find no support for that position." (P. 8). On Page 10, [Note 5.] however, the appellate court concluded:

"The City is not, as appellant argues, attempting to negate appellants *title* to mineral interests by virtue of its leases and the reservations in the City's deed. Appellant still possesses its leasehold interest in the minerals, but its ability to produce them has been restricted. If appellant had defeated the claim of a valid use of its police powers and established that the Ordinance constituted a taking, i.e., that it could not obtain access to the minerals through directional drilling or other means, then it would have been entitled to compensation had it brought its claim within the limitations period."

The court of appeals' finding that Wilson Oil still possessed the title to its leasehold interests, is evidentiary proof that Wilson Oil had the right in December 9, 1994, to ask for a variance hearing. The denial of that request is the basis for Wilson Oil's second claim of inverse condemnation. Wilson Oil filed this suit June 26, 1995, and its second claim was clearly not subject to any statute of limitations.

9.The court of appeals held that "when a city government passes an ordinance that is final and conclusive, it cannot be revised by the court unless the passing of the ordinance was arbitrary, unreasonable and a clear abuse of power. . . . There is a presumption in favor of the validity of the ordinance and appellant

faces an 'extraordinary burden' when asserting an ordinance is unconstitutional." (pp 13-14) In *Keystone Bituminous Coal Assn... V. DeBenedictis,* 480 U.S. 470, 501, 94 L.Ed.2d 472, 107 S. Ct. 1232, 1987, the Court held:

Of course, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations. A court must also satisfy itself that the legislature's "adjustment of the 'rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" . . .. But, we have repeatedly held that *unless the State is itself a contracting party,* courts should "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (emphasis added).

Because the City was a "contracting" party it met the exception of the United States Supreme Court. The appellate court erred in concluding there was a presumption in favor of the validity of the Ordinance.

For these reasons, Trail Enterprises, Inc., d/b/a Wilson Oil Company, Petitioner, requests that this Court grant this motion, reverse the judgment of the Fourteenth Court of Appeals and issue its opinion and judgment approving (1) Wilson Oil's first cause of action, that the enactment of Ordinance 67-2544, is unconstitutional and void as applied to Wilson Oil; (2) Wilson Oil's second cause of action, that the enactment and enforcement of Ordinance 67-2544, was an act of inverse condemnation as applied to Wilson Oil's property; (3) that the denial of an application for a variance hearing in 1994, was a second act of inverse condemnation as applied to Wilson Oil's property, and that this Honorable Court remand the case to the 80th District Court, Harris County, Texas, with directions to following the Judgment of this Court, and for such other relief to which it may be entitled.

Respectfully submitted

BY: /s/ _____
Howard W. Edmunds
Texas State Bar No. 06432000
P. O. Box 631362
Houston, Texas 77263-1362

J. Mitchell Smith
Texas State Bar No. 18626900
Bruce M. Partain
Texas State Bar No. 15548400

WELLS, PEYTON, GREENBERG, & HUNT, L.L.P.
P. O. Box 3708
Beaumont, Texas 77704
(409) 838-2644
Fax: (409) 838-4713
ATTORNEYS FOR PETITIONER, TRAIL ENTERPRISES, INC. D/B/AWILSON OIL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of PETITIONER'S MOTION FOR REHEARING has been provided to counsel for Respondent, City of Houston, as follows:

**Anthony W. Hall**
City Attorney
**Judy K. Hatfield**
Assistant City Attorney
**Andrea Y. Chan**
Assistant City Attorney
City of Houston Legal Department
P. O. Box 1562
Houston, Texas 77251
BY CERTIFIED MAIL, RRR

DATED this the 31st day of July, 1998.

s/s_____
Howard W. Edmunds

## APPENDIX L

**Pertinent Part of City of Houston Ordinance 67-2544 Adopted December 20, 1967**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON:**

* * * *

Section 1. That Section 1 of Ordinance 65-912 passed May 19, 1965, as amended, be, and the same is hereby further amended, by adding thereto a definition of the word "well", which shall read as follows, to-wit:

"**WELL:** Shall mean any hole or bore to any sand, formation, strata or depth, which has been, is being, or may hereafter be drilled, bored, sunk, dug or put down for the purpose of either exploring for or ascertaining the existence of any oil, gas, liquid hydrocarbon, or any of them, or any other mineral, or for the purpose of producing and recovering any oil, gas, liquid hydrocarbon, or any mineral, or any of them."

Section 2.That the aforesaid ordinance is, and the same is hereby further amended by adding thereto a section to be numbered as Section 2A and which shall read as follows, to-wit:

"2A.No well shall be drilled with the control area of Lake Houston which is nearer than 1000 feet from the normal water level of Lake Houston or any of its drains, streams or tributaries. In addition, no well shall be drilled within such control area at an elevation of less than forty-eight (48') feet above mean sea level."

* * * *

PASSED this 20th day of December, A. D. 1967.

APPROVED this 20th day of December A.D. 1967.

/s/ _____
Louis Welch
Mayor of the City of Houston

APPROVED:

/S/ _____
T. H. Cody
Assistant City Attorney

APPENDIX M

**CITY OF HOUSTON**
**Legal Department**
**P.O. Box 1562**
**Houston, Texas 77251-1562**

**713/247-2000**

**June 9, 1994**

**Mr. Howard W. Edmunds**
**President**
**Wilson Oil Company**
**1642 Sunrise Trail**
**Kingwood, Texas 77339-4043**

**Re:Lake Houston Claims**

**Dear Mr. Edmunds,**

**After reviewing your most recent correspondence of May 2, 1994, and after having carefully researched the arguments that you have advanced on behalf of Wilson Oil Company with regard to the above referenced matter, we are unable to find merit to the claims presented.**

**Sincerely,**

**/s/_____**
**Benjamin L. Hall, III**
**City Attorney**

APPENDIX N

WILSON OIL COMPANY

P.O. Box 631362
Houston, Tx 77263-1362
(713) 953 9718
Fax (713) 953 9718

December 9, 1994

Hon. Robert Lanier
Mayor, City of Houston
and Hon. City Council, City of Houston
P.O. Box 1562
Houston, Texas 77251

CERTIFIED MAIL NO. Z 037 194 670
RETURN RECEIPT REQUESTED

Dear Mr. Lanier and Members of the City Council:

On October 2, 1993, Wilson Oil Company filed a claim in the sum of $3,612,000.00 against the City of Houston for the illegal taking of our oil and gas properties. Subsequent thereto we furnished to the City many additional exhibits in support of our claim. Reference to the original claim and to the supporting exhibits is herein made for all purposes.

On June 9, 1994, Wilson Oil Company was notified by Mr. Benjamin L. Hall, III, City Attorney, City of Houston, Texas, that our claim was found to be without merit.

On December 20, 1967, the City Council passed Ordinance 67-2544, which prohibited the drilling of any oil or gas well within the control area of Lake Houston which is nearer than one thousand feet from the waters edge of Lake Houston or any of its

drains, streams, or tributaries. This prohibition is now in the current City Code under Article IV. Water Supply Protection, as Section 23-102.

We have been advised by the Permit Department of the City of Houston that the City has never knowingly approved a permit for the drilling of an oil or gas well within the prohibited zone. They did advise us that one permit was mistakenly granted, but the City obtained an injunction to stop the drilling. Your permit form contains the following clause:

"(ORD NO. 23-102) No well sahll (sic) be drilled within the control area of Lake Houston which is nearer than one thousand (1000) feet from the normal waters edge of Lake Houston or any of its drains, streams, or tributaries. In addition, no well shall be drilled within such control area at an elevation of less than forty-eight (48) feet above mean sea level."

The requirement that no well shall be drilled nearer than 1000 feet from any of the "drains, streams, or tributaries" going into Lake Houston has completely destroyed the value of our leases. Because of the many streams or tributaries located on our leases the Ordinance requires that any well drilled on the lease be located 3,000' to 4,000 feet from Lake Houston. All of the known oil and gas structures on our leases are located under Lake Houston or within 400 feet from the normal waters edge. Drilling commenced on our leases in 1912 and a total of 85 wells have been drilled.

Our leases are located on the northeast flank of the Humble Field, a highly structured salt dome. It is not technically or economically feasible to directionally drill a well 3,000 feet in such a structure.

Recent developments in improved 3-D seismic technology have found many oil structures that were bypassed in old salt dome fields. Expert geologists have advised us that several million barrels of oil could be recovered from our leases if we were able to drill with the benefit of 3-D seismic information.

Chevron U.S.A.,Inc. has recently used 3-D seismic technology to drill two very successful gas wells in the City of Humble. They are now planning a third well. One of the wells is located just 514.2 feet from the normal waters edge and the other is close to a stream or tributary going into Lake Houston. On December 14, 1993, Chevron U.S.A., Inc. applied to the Railroad Commission of Texas to have their discovery designated as a new field, the Cross Creek (Wilcox) Field. Their lease is about 3/4 mile west of our leases. If the Chevron wells were located within the city limits or the ETJ of Houston they could not have been drilled under ORD No. 23-102. The City of Humble does not prohibit drilling near Lake Houston, its drains, streams, or tributaries.

The City of Houston has not purchased any of the mineral rights or leasehold rights affecting our oil and gas leases. In 1948 the City purchased 45.9 acres of the surface only for the purpose of inundating that property to be part of Lake Houston. The Deed to the City specifically reserved all oil and gas, the mineral lease of Wilson Oil Company, and the right to drill and operate oil and gas wells on the property.

In 1954 the City executed a contract with Wilson Oil Company acknowledging, among other things, that Wilson Oil Company would be performing oil and gas drilling, exploration and production on the lease and Wilson agreed that such activities would be done in a manner as not to endanger, damage, or pollute the reservoir or source of water supply.

On December 20, 1967, the City Council passed Ordinance No. 67-2544, which is now codified as Art IV, Section 23-102, which contained the prohibition against drilling cited above. The prohibition against drilling has destroyed the value of our lease. No oil and gas company is interested in buying our lease in the face of the restrictive ordinance. We do not want to drill a well at this time, but we do desire to market the property with the clear understanding that any assignee of our lease would be able to drill without being prevented from drilling by Ordinance 23-102.

Because we are not interested in drilling at this time, but are interested in clearing the cloud which you have placed on the title of our oil and gas properties, we are not submitting to you the requirements of your permit procedure. It would be futile and costly to furnish insurance, bonds, engineering work, etc. for a permit application for a well which we are not going to drill, for a permit which you have never approved, and for a permit which cannot be approved under your Ordinance. ORD. No. 23-102 interferes with the ability of Wilson Oil Company to sell its oil and gas lease thereby taking from us our most important and valuable property right.

The enforcement of Ordinance No. 23-102, violates Art. I, Sections 3, 16, 17, 19, and 29 of the Texas Constitution, the 5th and 14th Amendments of the United States Constitution, and Art. I, Section 10, Clause 1 of the United States Constitution.

We request that you grant Wilson Oil Company a variance hearing for the purpose of requesting that you exempt Wilson Oil Company, its successors and assigns, from the provisions of Art. IV, Section 23-102, so that a permit to drill for oil or gas on its leases will not contain the prohibition against drilling "nearer than one thousand (1000) feet from the normal waters edge of Lake Houston or any of its drains, streams, or tributaries." The permit would still be subject to the other usual and normal requirements for a permit granted to an applicant for an oil and gas drilling permit. The variance would be in such a form as to satisfy the legal requirements of a purchaser of our leases so as to guarantee his right to drill on the leases. The legal basis for the granting of the variance would be threefold:

1. To honor the commitments the City of Houston accepted as a Grantee in a deed dated September 7, 1948, conveying 45.9 acres of surface only from Carrie B. House, recorded under Clerk's File No. 580075 in the Office of the County Clerk of Harris County, Texas, and being subject to a reservation of all mineral leases including that to Wilson Oil Company, as recorded in Vol. 248,

Page 244 of the Contract Records of Harris County, Texas, and being further subject to a reservation by the Grantor of the right to drill and operate oil wells on the conveyed property. The purchase was approved by Motion No. 4600, passed September 15, 1948, and;

2. To honor the commitments in the contract dated March 27, 1954, by and between the City of Houston and Wilson Oil Company, as approved by Ordinance No. 57, April 28, 1954. In Paragraph IV of said Contract the City agreed that Wilson Oil Company would be doing further drilling, exploration, and production in connection with said lease, and Wilson Oil Company agreed that such work would be performed in such a manner "as not to endanger, damage or pollute the reservoir or source of water supply, and all waste matter and contaminated substances caused by or produced thereby shall be taken care of by and at the expense of Company." Wilson Oil Company has honored the covenants of that contract for 27 years and considers its commitments thereunder as continuing obligations. Wilson Oil Company also expects the City of Houston to honor its continuing obligations under said contract; and

3.To recognize the fact that the City of Houston has not purchased the mineral rights owned by Wilson Oil Company under the leases affecting this property. We recognize that the City of Houston has the governmental power to acquire the ownership of our mineral leases. But to exercise this right, the City must properly proceed under its power of eminent domain and to pay Wilson Oil Company for the property the City has taken. By the adoption of Ordinance 23-102 the City has arbitrarily taken from every mineral owner, royalty owner, and mineral lessee its property without the payment of any compensation. That type of governmental action has never been valid in the United States of America, The Republic of Texas, or the State of Texas.

The purpose of the hearing would be to furnish to the City of Houston the final opportunity to address and adjust the grievous

wrong inflicted on Wilson Oil Company on December 20, 1967, by the passage of Ordinance No. 67-2544 and the continuous enforcement of that ordinance. Please grant this request for a hearing at the earliest opportunity.

Damages suffered by Wilson Oil Company in the recent floods make it imperative that we be allowed to market our valuable oil and gas property without the impossible burden placed upon us by your Ordinance. While we, like all property owners, did have substantial damages, it must be noted that none of the injuries resulted in the pollution of Lake Houston or of any land.

Thank you for your consideration of this request.

Yours very truly,

Wilson Oil Company:

_____

Howard W. Edmunds, President

cc: Mr. Benjamin L. Hall, III
City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

Mrs. Anna Russell
City Secretary
P. O. Box 1562
Houston, Texas 77251-1562

APPENDIX O

**WILSON OIL COMPANY**

**P.O. Box 631362**
**Houston, Tx 77263-1362**
**(713) 953 9718**
**Fax (713) 953 9718**

**March 2, 1995**

**Hon. Robert Lanier**
**Mayor, City of Houston**
**and Hon. City Council, City of Houston**
**P.O. Box 1562**
**Houston, Texas 77251**

**CERTIFIED MAIL NO. Z 037 194 671**
**RETURN RECEIPT REQUESTED**

**Dear Mr. Lanier and Members of the City Council:**

**Reference our letter to you, of December 9, 1994, mailed under Certified Mail No. Z 037 194 670. In the letter we requested that you grant Wilson Oil Company a variance hearing for the purpose of exempting Wilson Oil Company, its successors and assigns, from the following provisions of Chapter 23, Section 102:**

**"Sec. 23-102. Wells.**

**No well shall be drilled within the control area of Lake Houston which is nearer than one thousand (1,000) feet from the normal water's edge of Lake Houston or any of its drains, streams or tributaries. . . . "**

In our letter of December 9, 1994, we said on Page 2 that because of the many streams or tributaries on our property that drain into Lake Houston the Ordinance would require any drilling to be located 3,000 feet to 4,000 feet from the edge of Lake Houston. Upon further examination of the ordinance, however, we find that Chapter 23, Section 101 (10) defines the "watershed" of Lake Houston to be:

" All of the lands and areas surrounding Lake Houston, the drainage from which is so controlled by the terrain and terrain features, or by man-made facilities, that such drainage flows either directly or indirectly into Lake Houston." (Emphasis added)

In our letter of December 9, 1994, we had not considered the Ordinance as preventing drilling within 1,000 feet of a man-made drain that flowed directly or indirectly into Lake Houston. Accordingly, we amend the second paragraph of our letter of December 9, 1994, to read as follows:

The requirement that no well shall be drilled nearer than 1,000 feet from any of the "drains, streams, or tributaries" going into Lake Houston has destroyed the value of our leases. Because our leases contain many man-made drains, besides natural drains, streams, or tributaries, the Ordinance completely prohibits drilling on our leases.

You have not responded to our request of December 9, 1994 in which we asked that you grant us a hearing. If we do not receive a positive response from you by April 9, 1995 we shall consider that you have denied our request.

Very truly yours

Wilson Oil Company

BY: /s/_____
Howard W. Edmunds
President

cc: Mr. Gene Locke
City Attorney
City of Houston
P. O. Box 1562
Houston, Tx 77251-1562

Mrs. Anna Russell
City Secretary
P. O. Box 1562
Houston, Tx 77251-1562

**APPENDIX P**

NO. 95-31573

Trail Enterprises, Inc., d/b/a Wilson Oil Company

v.

The City of Houston

---

In the 80th Judicial District Court, Harris Count, Texas

**PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION FOR DECLARATORY JUDGMENT AND DAMAGES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Trail Enterprises, Inc. d/b/a Wilson Oil Company, and files this its First Amended Original Petition for Declaratory Judgment and Damages, complaining of Defendant, City of Houston, and for causes of action alleges that its property has been "taken" without its consent by the Defendant, City of Houston, in violation of the Fifth and Fourteenth Amendments of the United States Constitution and of Article I, Section 17 of the Texas Constitution, and shows unto this Honorable Court the following:

**Parties**

1. Plaintiff Trail Enterprises, Inc. ("Trail Enterprises") is a Texas corporation with its principal place of business at 9525 Ella Lee Lane, Apt. 316, Houston, Harris County, Texas 77063. Trail Enterprises operates as Wilson Oil Company ("Wilson Oil") under a Certificate of Operation under Assumed Name issued by the Office of the County Clerk of Harris County, Texas, on June 3,

1986, and recorded in that office under Certificate Number 702787.

2. Defendant, City of Houston ("City"), is a municipality existing under the laws of the State of Texas. The City of Houston has filed an Answer in this litigation. As set forth in the Certificate of Service, and pursuant to Rule 21a, Texas Rules of Civil Procedure, a true and correct copy of Wilson Oil's First Amended Original Petition has been provided to the City's attorney in charge, Judy Hatfield, Assistant City Attorney.

3. **Notice to Attorney General, State of Texas.** Since Wilson Oil alleges City of Houston Municipal Ordinance 23-102 of the current City Code is unconstitutional, the Attorney General of the State of Texas has been provided a copy of Wilson Oil's Original Petition by service of process on the Attorney General, Dan Morales, at the Price Daniels, Sr. Building, Austin, Travis County, Texas 78711-2548.

## Venue

4. Pursuant to Section 15.011, Texas Civil Practice and Remedies Code, venue is proper in this county.

## Factual Background

5. Trail Enterprises is the lessee under two oil and gas leases covering 885 acres of land adjacent to and beneath Lake Houston in Harris County, Texas. The oil and gas leases cover land located in the City of Houston or in areas covered by the City's extraterritorial jurisdiction. The mineral estate is part of a 985-acre tract in the Mary Owens Survey, A-611, Harris County, Texas. The 985-acre tract was acquired in 1905 by H. C. House ("House") from W. P. Hamblen.

6. The oil and gas lease owned by Wilson Oil is derived from the lease from H. C. House to Producers Oil Company, March 1,

1912, which covered 985 acres in the Mary Owens Survey in Harris County, Texas. On June 5, 1934, said lease was assigned to Wilson Oil, subject to a prior assignment of a 100-acre tract to other parties.

7. On September 7, 1948, Carrie B. House, successor in title to H. C. House, executed a deed to the City of the surface interest only in 45.9 acres of the 985-acre tract. The land was purchased for the purpose of constructing Lake Houston. The purchase price was $20.00 per acre. The deed was subject to the mineral leases of Wilson Oil and a reservation by the Grantor of the right to drill and operate oil wells on the conveyed property. The conveyance was in accordance with the "Summary of Land or Right-of-Way Purchase Agreement" which the Grantor had signed with the City on March 31, 1948. On September 15, 1948, City Council passed Motion No. 4600, giving authority to purchase the property from Carrie B. House with the ". . . grantor to retain mineral reservations subject to usual drilling clause."

8. On March 27, 1954, the City and E. M. Wilson d/b/a Wilson Oil entered into an agreement for the City to pay Wilson Oil to raise mounds for the purpose of elevating 12 wells that would be inundated when Lake Houston was completed. Wilson Oil agreed to construct the mounds and to release the City from damages to the leasehold estate caused by the inundation. Wilson agreed that all drilling, exploration, and production accomplished in connection with the lease would be done in such a manner as not to endanger, damage, or pollute the reservoir or source of water supply. On April 28, 1954, the City Council passed Ordinance No. 57 authorizing the Mayor to execute the Agreement and Contract with Wilson Oil.

9. On May 19, 1965, the City Council passed Ordinance 65-912, an ordinance to control the pollution of Lake Houston. No attempt was made to regulate oil and gas drilling, exploration, and production.

10. On December 20, 1967, the City Council passed Ordinance 67-2544, which amended Section I of Ordinance No. 65-912, the Lake Houston Ordinance. The ordinance added a new Section Two, which prohibited the drilling of wells within the control area of Lake Houston nearer than 1,000 feet from Lake Houston or any of its drains, streams, or tributaries. The "Control Area" is defined as "That land contained in the extraterritorial jurisdiction of the city, which contains waters that flow into or adjacent to the watershed of Lake Houston." By being "contained in the extraterritorial jurisdiction of the city" meant that the control zone extended five miles outside of the city limits. It also prohibited the drilling of wells in such control area at an elevation of less than 48 feet above mean sea level.

11. Ordinance No. 67-2544 now appears in Chapter 23 (Lake Houston), Article IV, Water Supply Protection, as Section 23-102 of the current City Code, which provides: "No Well shall be drilled within the control area of Lake Houston which is nearer than one thousand (1,000) feet from the normal water's edge of Lake Houston or any of its drains, streams or tributaries. In addition, no well shall be drilled within such control area at an elevation of less than forty-eight (48) feet above mean sea level." Article IV., section 23.102. (11) defines a Well" as "any hole or bore to any sand, formation, strata, or depth, which has been, is being, or may hereafter be drilled, bored, sunk, dug or put down for the purpose of either exploring for or ascertaining the existence of any oil, gas, liquid hydrocarbon, or any of them, or any other mineral, or for the purpose of producing and recovering any oil, gas, liquid hydrocarbon, or any mineral, or any of them." The Code contains no provision for a hearing to receive a variance or exception to the prohibition against drilling wells in the control area. All of the wells drilled from 1912 to date on the leases of Wilson Oil are within the prohibited zone and could not have been drilled under Ordinance 67-2544 or currently, Section 23-102. All of the known oil deposits on the leases of Wilson Oil are within the prohibited zone.

12. On April 1, 1972, the owners of Wilson Oil assigned the oil and gas leases to Forest Cove Development Company ("Forest Cove"). Forest Cove thereafter operated as Wilson Oil under a Certificate of Operation under Assumed Name issued by the Office of the County Clerk of Harris County, Texas. Forest Cove assigned the oil leases to its wholly-owned subsidiary, Trail Enterprises, on May 29, 1986.

## Factual Background of Variance Request

13. On December 9, 1994, Wilson Oil made demand upon the City to grant Wilson Oil a variance hearing for the purpose of exempting Wilson Oil, its successors and assigns from the provisions of Chapter 23, Section 102, so that a permit to drill for oil and gas on its leases will not contain the prohibition against drilling within 1000 feet of the normal waters edge of Lake Houston, or any of its drains (including man-made drains), streams, or tributaries. The City did not respond to this request or other demand letters from Wilson Oil.

### First Cause of Action

### Since Ordinance 67-2544, currently Section 23-102, is Void, Wilson Oil is Entitled to Declaratory Judgment

14. Ordinance 67-2544, and currently Section 23-102, deprived Wilson Oil of its property without its consent, without due process of law in violation of Art. I, § 19 of the Bill of Rights of the Texas Constitution, and in violation of the due process clause, Fifth Amendment and Fourteenth Amendment to the United States Constitution. Evidence shows that the Ordinance was prepared two months before its passage, but the City did not provide any notice to Wilson Oil or to other owners of mineral interests. On December 20, 1967, however, the City was suddenly faced with an "emergency" that required immediate passage of the Ordinance on only one reading. The only "emergency" that existed was that if the City had tried to pass the Ordinance on the normal three readings, the oil and gas industry would have become aware of the

Ordinance and fought its adoption. The "emergency" was created for the purpose of denying the oil and gas industry the opportunity to oppose the Ordinance.

15. The City did not provide any notice prior to the passage of Ordinance 67-2544. The Agenda for the Council Meeting of December 20, 1967, does not give notice to anyone involved in the oil and gas industry:

"m. Amend Sec 1 of Ord. No. 65-912 passed May 19, 1965, regulating, controlling & prohibiting pollution of Lake Houston."

16. Despite the fact that its method of citation by publication was found to be a denial of due process in *City of Houston v. Fore*, 401 S.W.2d 921 (Tex.App.--Waco, 1966) aff'd (Tex.) 412 S.W.2d 35, 1967, the City nevertheless passed Ordinance 67-2544 just ten months later without notice to the mineral and leasehold owners with whom it had executed contracts, conveyances, and other agreements. Thus, the City unilaterally and arbitrarily canceled its contractual obligations.

Ordinance 67-2544 also denied to Wilson Oil every other element of procedural and substantive due process. It denied a hearing, the opportunity to prepare for a hearing, the right to appeal, the right of reasonableness, and the right that it not be arbitrary. The Ordinance was an absolute ban on drilling and did not provide for any exception.

17. The oil and gas permit form used by the City contains the following:

(ORD NO 23-102) No well shall be drilled within the control area of Lake Houston which is nearer than one thousand (1000) fee from the normal waters edge of Lake Houston or any of its drains, streams or tributaries. In addition, no well shall be drilled within such control area at an elevation of less than forty-eight (48) feet above mean sea level.

18. Ordinance 67-2544 denied to Wilson Oil the equal protection of the laws in violation of Art I, § 3, of the Bill of Rights of the Texas Constitution, and of the Fourteenth Amendment to the United States Constitution. It is clear that the Ordinance was adopted for the benefit of the City. The City wanted to stop further oil and gas drilling in the area of its main water reservoir. The City could not afford to purchase the many oil and gas interests and so tried to control production by means of a law regulating the industry. That law has effectively stopped oil and gas production, without cost to the City, for over 25 years. By the adoption of Ordinance 67-2544, the City deprived the mineral and leasehold owners of equal protection under the law by having them bear all of the cost of protecting the water supply, "which in all fairness and justice, should be borne by the public as a whole." See, *Armstrong v. U.S.*, 364 U.S. 39, 80 S.Ct. 1963 (1960) and *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S. Ct. 3141 (1987).

19. Ordinance 67-2544 impaired the contractual rights of Wilson Oil without its consent and in violation of Art I, § 16 of the Bill of Rights of the Texas Constitution, and in violation of Art I, § 10, Clause 1, of the United States Constitution.

20. Ordinance 67-2544 was a "retroactive" law in violation of Art I, § 16, of the Bill of Rights of the Texas Constitution.

A retroactive law is one meant to act on things that are past. As such, a statute is retroactive which takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes new duties, or adopts a new disability in respect to transactions or considerations already past, and which affects acts or rights accruing before it came into force.

Vernon's Ann.Tex.Const. Art. I. § 16, Interpretative Commentary, p. 112. Ordinance 67-2544 was retroactive in its application to all of the contracts, leases, and agreements.

21. Pursuant to Texas Civil Practice and Remedies Code § 37.004, Wilson Oil asserts it is entitled to a declaratory judgment that it is a "person interested under a . . . written contract," or "whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . ." Wilson Oil requests a declaratory judgment of the validity of Ordinance 67-2544, currently Section 23-102, and holding that said Ordinance is void or unenforceable as to Wilson Oil. Further, Wilson Oil requests the recovery of its costs and reasonable and necessary attorneys' fees as are equitable and just.

## Second Cause of Action

### Inverse Condemnation

22. Ordinance 67-2544 violated the Fifth Amendment to the United States Constitution because it was a taking of Plaintiff's property for public use without the payment of just compensation and without Plaintiff's consent. It was an act of inverse condemnation. It also violated Art. I, § 17, of the Bill of Rights of the Texas Constitution because it was an act of taking, damaging, or destroying Wilson Oil's property for public use without the payment of adequate compensation and without Plaintiff's consent.

23. The sole purpose of Ordinance 67-2544 was to benefit the City. The City wanted to stop further oil and gas development in the area of its primary water reservoir. That is an understandable goal, but is one that can only be accomplished by means of the power of eminent domain. The Ordinance is an unreasonable and arbitrary use of its police power by the City.

24. By enacting City Ordinance No. 67-2544, as incorporated into the Houston City Code, the City took property owned by Wilson Oil for public use without its consent, without due process of law, and without just compensation. The enactment of the Ordinance was an unreasonable interference with Plaintiff's right to use and

enjoy its property and denied Plaintiff all economically beneficial, viable, and productive uses of its property. The enactment of the Ordinance was without procedural due process because the Ordinance mandates an absolute ban on drilling on Wilson Oil's property and provides no basis for a permit, for a hearing, or for a variance or exception to the Ordinance. The Ordinance was an act of inverse condemnation by the City. The City passed the Ordinance denying Wilson Oil the right to drill despite the fact the City had previously agreed and acknowledged Wilson Oil had such right in numerous Contracts, Ordinances, Resolutions, Memorandums, Letters, and as the Grantee in a Deed affecting said property. All of those instruments were prepared or approved by the Legal Department of the City of Houston. By passing Ordinance 67-2544, the City, by regulation, unilaterally disavowed its prior covenants and agreements with Wilson Oil thereby taking Wilson Oil's property without Wilson Oil's consent and without having to pay for the property under the laws of Eminent Domain.

25. As a result of the City of Houston's taking of Wilson Oil's property in violation of the Fifth Amendment to the United States Constitution, as incorporated against the States by the Fourteenth Amendment to the United States Constitution, Wilson Oil has been damaged in an amount in excess of the minimum jurisdictional limits of this Court.

26. Texas Constitution, Article I, Section 17, provides that:

No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of the person. Tex. Const. Art. I, § 17.

By enacting City Ordinance No. 67-2544, the City of Houston has taken, damaged, destroyed, directly invaded, and appropriated Wilson Oil's property without its consent. As a result of the City of Houston's taking of Wilson Oil's property without its consent and in violation of Article I, Section 17 of the Texas Constitution,

Wilson Oil has been damaged in an amount in excess of the minimum jurisdictional limits of this Court.

WHEREFORE, PREMISES CONSIDERED, Trail Enterprises, Inc. d/b/a Wilson Oil Company, Plaintiff, requests that this Court grant Wilson Oil the declaratory relief requested herein, and actual damages in an amount in excess of the jurisdictional limits of the Court, attorneys' fees as requested herein, all costs of court and litigation expenses (including expert witness fees), pre-judgment interest, post-judgment interest, and all other relief to which Plaintiff is entitled.

Respectfully submitted,

WELLS, PEYTON, BEARD,
GREENBERG, HUNT, AND
CRAWFORD, L.L.P.

By:s/s _____
Bruce M. Partain
Texas State Bar No. 15548400
P.O. Box 3708
Beaumont, Texas 77704
(409) 838-2644
Fax (409) 838-4713

## DEMAND FOR TRIAL BY JURY

As previously requested in its Original Petition, Plaintiff renews its demand for a jury trial.

DATED this 5th day of February, 1996.

s/s_____
Bruce M. Partain

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's First Amended Original Petition for Declaratory Judgment and Damages has been served upon counsel for Defendant, City of Houston, as follows:

Judy K. Hatfield
Assistant City Attorney
Attorney-in-Charge for Defendant
P. O. Box 1562
Houston, Texas 77251
BY FEDERAL EXPRESS

DATED this 5th day of February, 1996.

s/s_____
Bruce M. Partain

APPENDIX Q

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Austin, Texas 78711

(512) 463-1312

July 22, 1998

Mr. J. Mitchell Smith
Wells, Peyton, Greenberg & Hunt
P.O. Box 3708
Beaumont, TX 77704-3708

Ms. Andrea Chan
Assistant City Attorney
P.O. Box 1562
Houston, TX 77251

RE: Case Number 98-0001
Court of Appeals Number: 14-96-00689-CV
Trial Court Number: 95-31573

Style: TRAIL ENTERPRISES, INC.
d/b/a WILSON OIL COMPANY

v.

CITY OF HOUSTON

Dear Counsel:

Today, the Supreme Court of Texas granted petitioner's unopposed motion for extension of time to file motion for rehearing in the above referenced case until August 4, 1998.

Sincerely,
John T. Adams, Clerk

by: s/s_____
Michael H. Kopp, Deputy

cc: The Honorable Olen Underwood
Ms. Mary Jane Gay, Clerk
Mr. Charles Bacarisse

APPENDIX R

**Pertinent Part of City of Houston Ordinance 67-912**
**Adopted May 19, 1965**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON:**

The City Council of the City of Houston, in the discharge of the obligations imposed upon it by the State of Texas to protect the health, safety and welfare of its residents and all consumers of its domestic water supply and the users of its industrial and commercial water supply, and in the exercise of this governmental function, hereby adopts and enacts the following rules and regulations to established, preserve and protect the purity, potability, quality and safety of the waters and reservoir of Lake Houston.

Section 1. When used herein the following words and terms shall have the following meaning unless expressly indicated otherwise:

* * * *

(d) Watershed: All of the lands and areas surrounding Lake Houston, the drainage from which is so controlled by the terrain and terrain features, or by man-made facilities, that such drainage flows either directly or indirectly into Lake Houston.

(e) Control Area: The land around the Lake within an area of five (5) miles in width measured from the Normal Water's Edge of, and within the watershed of, Lake Houston.

* * * *

PASSED this 19th day of May, A.D.1965.

APPROVED this 19th day of May, A.D. 1965.

/s/ _____
Louis Welch
Mayor of the City of Houston

APPROVED AS TO FORM:

/S/ _____
Charles L. Weaver
Senior Assistant City Attorney

APPENDIX S

Howard W. Edmunds
Attorney at Law
P.O. Box 631362
Houston, Texas 77263-1362

713-953-9718
Fax 713-953-9718

October 21, 1998

Mr. John T. Adams, Clerk
Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Rm. 104
Austin, Texas 78701

RE: No. 98-0001, Trail Enterprises, Inc., d/b/a Wilson Oil Company v. City of Houston; In the Supreme Court of Texas

Dear Mr. Adams:

Enclosed herewith please find a certification I have prepared for delivery to The Chief Justice, Mr. Thomas R. Phillips. It would greatly appreciated if Mr. Phillips would execute this certificate and return it to me for delivery to the United States Supreme Court.

Thank you and the Chief Justice for your continued courtesy and assistance in this matter.

Very truly yours,

/s/
Howard W. Edmunds

## APPENDIX T
## THE SUPREME COURT OF TEXAS

**TO: THE UNITED STATES SUPREME COURT**

This Court hereby certifies that in the appeal of Trail Enterprises, Inc. d/b/a Wilson Oil Company v. The City of Houston, No. 98-0001, the Petition for Review was denied by this Court on July 3, 1998, and the Motion for a Rehearing was denied by This Court on September 3, 1998. In said case, Appellant insisted that under the facts and documentary evidence presented that City of Houston, Texas, Ordinance No. 67-2544, as applied to appellant, was (1) repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws; and (2) was also repugnant to Article I, § 10, Clause 1 of the United States Constitution, which provides that "[n]o State shall . . . pass any . . . law impairing the Obligations of Contracts." All of the above allegations of Appellant were considered and passed upon by this Court.

Certified to in Austin, Texas, this _____day of October, 1998.

Thomas R. Phillips
Chief Justice, The Supreme Court of Texas

APPENDIX U

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Austin, Texas 78711

TEL: (512) 463-1312

FAX: (512) 463-1365

October 27, 1998

Mr. Howard W. Edmunds
Post Office Box 631362
Houston, Texas 77263-1362

Dear Mr. Edmunds,

We are in receipt of your letter of October 21, 1998 concerning case number 98-0001 (Enterprise v. Houston) in which you requested the Chief Justice sign a statement you had prepared. The Chief Justice declines.

Sincerely,

/S/ _____
John T. Adams
Clerk